

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30773

AMBER ELIZABETH FRERK,
Plaintiff-Appellant,

vs.

LEO DEAN HEGGEN, JOANNE B. HEGGEN, and BRUCE HEGGEN
Defendants-Appellees.

APPELLANT'S BRIEF

Appeal from Circuit Court
Second Judicial District,
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, presiding

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PRELIMINARY STATEMENT

Plaintiff-Appellant Amber Frerk will be referenced as “Ferk” or “Plaintiff.” Defendants-Appellees Bruce Heggen, Leo Heggen, and Joanne Heggen will be referenced individually by their first names¹ and collectively as “Heggens” or “Defendants.” The circuit court record and hearing transcript will be referenced as “CCR” followed by a page designation. The Appendix will be referenced as “Appx.” followed by a page designation. Content from the video exhibit containing the Kelo-TV news story where Bruce appeared, identified at CCR 818, will be referenced as “Video Clip.”

JURISDICTIONAL STATEMENT

This is an appeal from a June 25, 2024 circuit court Memorandum Decision and Order Granting Defendants’ Motion for Summary Judgment. CCR 316–417. Plaintiff filed a Notice of Appeal to this Court on July 24, 2024. CCR 771–73. This Court has jurisdiction pursuant to SDCL 15-26A-3(1) and 15-26A-4.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court Erred in Dismissing Plaintiff’s Negligence Claims on Summary Judgment.

The circuit court incorrectly dismissed Plaintiff’s negligence claims against Defendants on summary judgment because it improperly acted as a fact finder. It dismissed each tort claim in the face of disputed facts while weighing the evidence and making credibility assessments. Further, the lower court departed from the longstanding, factor-based inquiry used to assess breach of duty animal vehicle collisions.

¹ This convention is used to distinguish between the family members; no disrespect is intended.

- *Casillas v. Schubauer*, 2006 S.D. 42, 714 N.W.2d 84.
- *Atkins v. Stratmeyer*, 1999 S.D. 131, 600 N.W.2d 891.
- *Pexa v. Clark*, 85 S.D. 37, 176 N.W.2d 497 (1970).
- *Eixenberger v. Belle Fourche Livestock Exch.*, 75 S.D. 1, 58 N.W.2d 235 (1953).
- SDCL 15-5-56.

II. Whether the Circuit Court Erred in Dismissing Plaintiff's Negligence Per Se Claims on Summary Judgment.

The circuit court erred when it determined the Minnehaha County Ordinances could not give rise to claims of negligence per se because they did not create a standard of care, did not create a protected class of persons, and did not contemplate injuries.

- *Davies v. GPHC, LLC*, 2022 S.D. 55, 980 N.W.2d 251.
- *Baatz v. Arrow Bar*, 426 N.W.2d 298 (S.D. 1988).
- MC 46-14.
- MC 52-17.

STATEMENT OF THE CASE

On September 19, 2022, Frerk filed her underlying Complaint against the Heggens which commenced case number 49CIV22-002356 in the Circuit Court of the Second Judicial Circuit. CCR 1–7. The matter was assigned to the Honorable Douglas P. Barnett. Frerk's Complaint set forth claims of negligence and negligence per se against the Heggens arising from a vehicle-cow collision that resulted in significant injuries. Depositions of each party, one lay witness, and one expert witness were taken. CCR 226–234, 239–240, 257–58. The parties engaged in written discovery. *E.g.*, CCR 523–530.

The Heggens filed a motion for summary judgment and apposite documents on February 16, 2024. CCR 316–417. Frerk filed a response brief and supporting materials.

CCR 420–586. The Heggens filed a reply brief. CCR 587–640. The court held a motions hearing on March 26, 2024. CCR 418. On April 18, 2024, Frerk filed a supplement to her response brief after obtaining new evidence. CCR 659-663. The Heggens filed a response to this supplement the following day. CCR 664-675. On June 25, 2024, the circuit court issued its Memorandum Decision and Order granting the Heggens’ relief and dismissing all claims. CCR 316–417. Frerk timely file a notice of appeal with the circuit court on July 24, 2024. CCR 771–73.

STATEMENT OF FACTS

On October 12, 2019, at about 11:45 pm, Frerk was driving on Highway 11 in Minnehaha County. CCR 338 ¶3, 339 ¶4. Traveling northbound from the intersection of Highway 11 with 258th Street, the highway becomes a bridge that passes over Split Rock Creek. CCR 339 ¶4. The subject collision with the cow occurred on the roadway that passes over this bridge. CCR 339 ¶5. The cow, owned by Bruce, had escaped from pastureland, owned by Leo and Joanne, that flanks Highway 11 on both sides of the road where the collision occurred. CCR 320, 517, 551 ¶2. Cattle could freely cross under the bridge to access the pasture on both sides of Highway 11. CCR 433 ¶P25, 513.

The Character of the Road. Highway 11 was not well lit; there were no lights along the road bisecting the subject pasture. CCR 431 ¶P1, 507, 518, 541. The road was paved with black asphalt. CCR 433¶18; 507, 518, 540-41. There were neither signs warning motorists of potential cattle in the roadway nor were there cattle guards on Highway 11 in the area. CCR 433, ¶¶16–17; 508-09, 518, 541–42. The road conditions the day of the collision were wet and the weather in Sioux Falls that days was a mix of rain and snow. CCR 431 ¶P2, 469, 471, 478.

The Kind of Traffic on the Roadway. Highway 11 is a busy road with consistent car and semi-trailer traffic. CCR 432 ¶13, 436. Highway 11 is one of the busiest, heavily trafficked roads in eastern South Dakota. CCR 433 ¶P14, 436, 552 ¶¶6–7, CCR 563.

The Time of Day. The collision occurred at approximately 11:45pm, when it was dark outside. CCR 432 ¶12, 482, 405, 519. The cow that Ms. Frerk collided with that escaped from the Heggen Property was black. CCR 433 ¶19, 531.

Recent Flooding and Fence Damage. The year of the collision, 2019, was a very wet year in Minnehaha County. CCR 432 ¶3, 502. The portions of Split Rock Creek that flowed through the Heggen pastures flooded often due to the wet conditions. CCR 432 ¶7, 503, 547–550. It became necessary to repair impacted fences when the water levels of Split Rock Creek receded, although no records of these repairs exist. CCR 432 ¶6, 834–835.

Split Rock Creek experienced historic high water levels in mid-September 2019, which resulted in a flood stage and persistent above average gage height for over a month after peak levels. CCR 436 ¶54, 563. Most of the Heggen pasture was underwater towards the end of September 2019; that contributed to fence integrity issues. CCR 436 ¶55, 436 ¶54, 552 ¶16, 553 ¶29. At one point that year, the water level in the river on the Heggen Property was so high that water got into the fence around the bridge where the collision with the cow occurred. CCR 432 ¶9, 505, 545. Rising water levels are known to push cattle closer to the fence, which necessitated increased monitoring of fence integrity. CCR 432 ¶P5, 501. Defendants should have been on notice of an increased risk of fence integrity issues at the time of the collision due to recent heavy rains and flooding. CCR 432 ¶P54, 499; 554 ¶32.

Evidence of Cattle Behavior. It is highly unlikely that a large, older cow, on an uphill and wet grade, would attempt to jump a fence or would be successful in doing so. CCR 432 ¶P10, 492, 553 ¶26, 554 ¶36. Cattle generally prefer to walk uphill. CCR 560, 553 ¶27. Cows are herd animals that generally move in a direction to rejoin the herd if they are separated from their herd mates. CCR 560, 553 ¶29.

Past Issues with Loose Cattle. Cattle escaped from the Heggen Property before: one stray cow resulted in a collision with a motorist on Highway 11. CCR 436 ¶P56, 513, 520. In 2019 alone, cows were found outside of their enclosures multiple times. CCR 436 ¶P51, 425–26, 522. In addition, there were several past incidents where gates on the Heggen Property were left standing wide open. CCR 433 ¶P20. On at least one incident, three cows escaped the pasture when the gates were left open. *Id.* On occasion, someone else's cattle would come onto Defendants' property. CCR 433 ¶P21. These other cattle would gain entry to Defendants' property when a hot wire was shorted, or a fence post was knocked down. *Id.* Beyond this, Bruce told a news reporter in April 2015 that his cattle broke fencing down three different times, and laid over 50 feet of fence over flat. *See* Video Clip, CCR 673-74.

Past Issues with Integrity of the Pasture Enclosure. In the past, fisherman had cut fences and canoers had cut electric fence to access the river. CCR 434 ¶P27, 536. These people gained access to Defendants' property through gates. CCR 434 ¶P28, 536.

Loose Cattle After the Crash and Early Remove of Herd from Pasture. The cattle herd was removed from the subject pasture weeks earlier than usual. CCR 436 ¶P52, 412 ¶7, 413 ¶12, 522; 525–26. This occurred just two days after the vehicle-cow collision in this suit. CCR 338 ¶1, 339 ¶5.

Location of Cattle Escape in Close Proximity to Fencing Damaged by Flooding.

The cow breached an area of fence southwest of the south end of the bridge on Highway 11. CCR 554, ¶37. This is the same area where the flooding of Split Rock Creek had impacted the pasture fence weeks earlier. CCR 432, 505, 545–46. When viewed in 2023, the fence was in a state of disrepair that was indicative of longstanding lack of maintenance. CCR 494–96.

Impact of Land Topography in Area where Cow Escaped on Fence Integrity.

The subject pasture has a rolling topography. CCR 434 ¶P34, 553 ¶20. Both the barbed wire fencing and the high tensile wire are intended to follow the topography of the Pasture to effectively confine the cattle. CCR 434 ¶P35, 552 ¶14. The pasture fencing included electrified high tensile wire. Since the high tensile wire is a single strand of wire, it must follow the terrain at a relatively consistent elevation to be effective. CCR 434 ¶P36, 489. To be effective in confining Black Angus cattle, a single strand high tensile wire should be approximately the height of the animal's neck while grazing. CCR 434 ¶P37, 489. If a single strand high tensile wire is too tall, it will hit a cow at a height past its shoulders, and the cow would more than likely bolt forward and breach the fence. CCR 553. There is a topographical change in the area where the collision occurred that caused the high tensile wire in that area to be too high off the ground. CCR 435 ¶P39, 493. Simply checking that a high tensile wire is electrified is not sufficient to ensure its effectiveness. Electrical wire that is set too high off the ground to be effective would still function appropriately when tested with a voltage tester. CCR 435 ¶P40.

Evidence of Negligent Fence Inspection and Monitoring. The only checks that Bruce Heggen testified that he did on the high tensile wire was checking the electrical

lights at the end of the electrical runs, not the height of the high tensile wire. CCR 351, 493. Bruce limited the inspection of the high tensile wire by relying on the fence monitoring lights to indicate the fence was intact. CCR 554 ¶30. Bruce and Leo did not act reasonably in maintaining the fence. CCR 554 ¶31. By checking the electrical status of the high tensile wire, Defendant failed to adequately inspect the fence to ensure the wire was attached to all posts at an effective height above the ground. CCR 554 ¶34. The cow more likely than not escaped from an area where the barbed wire fence was in disrepair and the high tensile wire was too high off the ground to be effective. CCR 554 ¶¶38–39.

In 2023, Dr. Little visited the Heggen Property to assess the integrity of the fencing. CCR 432, 553 ¶26, 554 ¶36, 622. The five-strand barbed wire fence on the west side of Highway 11 on the Heggen Property was in grave disrepair. CCR 435, 485. The fence had loose and broken strands and gaping holes. CCR 435, 486. The five-strand barbed wire fence would be unable to confine animals effectively in the condition it was in during this inspection. CCR 435, 485-86. The state of gross disrepair that the fence was in in 2023 would not happen quickly and raised concerns about the fencing maintenance on the Heggen Property. CCR 388, 435, 485–86.

STANDARD OF REVIEW

Entry of summary judgment by a circuit court is reviewed under a de novo standard of review. *Harviteix v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 9, 915 N.W.2d 697, 700 (citation omitted). All reasonable inferences derived from the facts should be viewed in the light most favorable to the nonmoving party. *Krier v. Dell Rapids Township*, 2006 SD 10, ¶ 12, 709 N.W.2d 841, 844–45. The moving party must clearly

show the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *In re Estate of Shuck v. Perkins County*, 1998 SD 32, ¶ 6, 577 N.W.2d 584, 586. Affirming the trial court’s grant of a motion for summary judgment is only appropriate if no genuine issues of material fact exist and the legal questions have been correctly decided. *Wyman v. Bruckner*, 908 N.W.2d 170, 174 (S.D. 2018) (citation omitted). A de novo standard of review is also used to assess the interpretation of an ordinance giving rise to a negligence per se claim, is reviewed de novo. *City of Onida v. Brandt*, 2021 S.D. 27, ¶ 13, 959 N.W.2d 297, 300; *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 42, 980 N.W.2d 251, 263.

ARGUMENT

The right to a jury trial “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” *Blakely v. Washington*, 542 U.S. 296, 305–6 (2004) (“Just as suffrage ensures the ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”). South Dakota’s Constitution recognizes that the right of trial by jury shall remain inviolate. S.D. Const. art. VI, § 6. This state codified the right to a jury trial to guarantee it. SDCL 15-6-38(a)–(b); *see also Suvada v. Muller*, 2022 S.D. 75, ¶ 19, 983 N.W.2d 548, 556. A jury functions to find the facts. *Shannon v. United States*, 512 U.S. 573, 579 (1994).

Tort actions are the types of cases where the role of the jury is most needed; common law employs reasonableness under the circumstances as the yardstick for the conduct of others. It follows that granting summary judgment on negligence claims is generally not viable and is reserved for very rare circumstances; every situation is unique. *Casillas*, 2006 S.D. 42, ¶ 13, 714 N.W.2d at 88.

At bottom, after imposing the incorrect standard and omitting consideration of a required element, the circuit court invaded the province of the jury by acting as a fact finder on Frerk's negligence claims. Moreover, the trial court erred by dismissing Frerk's negligence per se claims. Therefore, Frerk asks the Court reverse the circuit court's order granting summary judgment and remand the matter for further proceedings.

I. The Circuit Court Erred by Granting Summary Judgment on Frerk's Negligence Claims.

a. The Trial Court Improperly Acted as a Fact Finder.

While "[s]ummary judgment is generally not feasible in negligence cases," trial courts have authority to determine whether a duty exists as a question of law². *Casillas*, 2006 S.D. 42 at ¶ 13, 714 N.W.2d at 88 (citations omitted). Here, the circuit court first addressed the question of law: whether the Heggens had a duty of care regarding the livestock. CCR 784-785. Once the issue of duty is decided, determining whether a breach of that duty occurred is a decision for the finder of fact. *Casillas*, 2006 S.D. 42 at ¶¶ 12-4, 714 N.W.2d at 88 (trial court erred in granting summary judgment on issue of breach in bull-vehicle collision); *Zeeb*, 401 N.W.2d at 537 (reversing erroneous grant of summary judgment in cow-vehicle collision).

The focal point of this case is whether the lower court erred by stepping into the role of the fact finder and granting summary judgment on the issue of negligence. In situations like this, there is no question that circumstantial evidence is crucial.

² During the motions hearing, the trial court asked, "But *Casillas* does not stand for the proposition that [the court] can't grant summary judgment, correct?" CCR 885. Plaintiff's counsel answered that this was true. *Id.* As *Casillas* makes clear, courts are entitled to grant motions for summary judgment on questions of law like the threshold question of whether a duty of care exists.

Circumstantial evidence is treated the same as direct evidence under the law. *See* S.D. Pattern Jury Instruction 1-60-20. The summary judgment order summarily rejected that Plaintiff's circumstantial evidence had any bearing on disputes of material facts: "any circumstantial evidence in Plaintiffs favor may support standalone factual assertions, but they fail to raise a genuine dispute of how the cow escaped, let alone how Bruce negligently maintained the enclosure." CCR 747. The proceedings below reveal that the evidence and its reasonable inferences—viewed in Frerk's favor—are sufficient to survive summary judgment on t whether the Heggens breached their duty of care.

The erroneous fact finding of the lower court is evident in three ways. First, the trial court granted summary judgment when material factual disputes remained. Second, it made a credibility determination of Frerk's expert witness, Dr. Little. Third, the lower court weighed the evidence and made findings of fact unsupported by the record. These errors are set forth in more detail below.

i. The circuit court granted summary judgment where material factual disputes about whether the Heggens could have reasonably anticipated the cow would stray onto the highway persisted.

In the face of a robust record of disputed facts, the circuit court determined no breach occurred and held that all facts supported the Heggens' lack of liability. CCR 748. This ruling improperly took the issue of liability away from the jury. In a ruling incompatible with the evidence before it, the trial court impermissibly disposed of claims with ample supporting evidence and questions for the jury. *See Heib v. Lehrkamp*, 2005 SD 98, ¶ 45, 704 N.W.2d 875, 889–90 (Sabers, J., dissenting) (noting summary judgment is an extreme remedy only to be used "when the truth is clear"); *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D.1995) (noting that "[s]ummary judgment is a drastic remedy and

should not be granted unless the moving party has established a right to a judgment with such clarity as to leave no room for controversy”). “Summary judgment is not appropriately granted just because the court believes the non-moving party will not prevail at trial.” *WULF v. SENST*, 2003 SD 105, ¶ 17, 669 N.W.2d 135, 141.

The evidence below included deposition testimony from six witnesses, expert testimony, traffic data, cattle records, photographs of the flooded pasture, public water level data, maps, and more. This is simply not a case where summary judgment was entered because the nonmoving party submitted a threadbare opposition; Frerk specifically proffered evidence pertinent to each factor to support her claims of negligence. Every single fact viewed in Frerk’s favor did not foreclose a reasonable person from concluding that the Heggens breached their duty. A jury could conclude the Heggens were negligent by failing to appropriately maintain the pasture fence, failing to adequately inspect the fence line, or failing to move cattle to a pasture where a flooding wasn’t wreaking havoc on the integrity of the only barrier keeping livestock off the busy, adjacent highway.

There are myriad disputes of fact that the court characterized as undisputed in rendering its conclusion:

- **There is a factual dispute about whether the fence was in poor condition and monitored appropriately given the conditions.**

The summary judgment order stated there was “no evidence that the fence was in disrepair.” CCR 747. While there was testimony from Bruce that the fence was in place during his checks, there is also evidence to contradict this.

To start, there is evidence that the wet conditions and flooding of Split Rock Creek around the time of the crash led to extensive fence damage near the Highway 11

bridge, CCR 502-503. Photographs from the Heggen's property taken in September 2019 show completely waterlogged fences and leaning steel fenceposts, CCR 547-50. Bruce had to repair the fence when the water receded but had no records of doing so, CCR 834-5. One can infer the repairs occurred at some point after the water level returned closer to normal. Data shows the historic high water levels of Split Rock occurred in mid-September 2019 and persisted above gage height for over a month after peak levels, CCR 566. A juror could infer that the repairs to the damaged areas of the fence were ongoing when the collision occurred on October 12, 2019 since the water was so significant in the photos and remained above gage height for so long according to water level data.

Further, Bruce's testimony about his checks of the fence reveal he did not check whether the high tensile wire was positioned appropriately, but instead relied upon electric testers and lights to determine the function of the electrical fence, CCR 351. Dr. Little offered testimony that the rolling topography of the pasture section southwest of the bridge impacted the integrity of the high tensile wire, which wouldn't be visible by using testers or looking at the indicator lights Bruce used to inspect the fence. Dr. Little concluded, based upon his review of the evidence and topography, that the fence was breached in an area where the high tensile wire was too high and the barbed wire strands were not taut, CCR 554 ¶34, CCR 388, CCR 485-6. He also opined that regular fence inspections are necessary, particularly in conditions like those in 2019 that resulted in decreased integrity of the fence, CCR 554 ¶32. Ultimately, Dr. Little concluded that Bruce and Leo did not act reasonably in maintaining the fence. *Id.* at ¶31.

There were also variations in Bruce's testimony about the frequency at which he checked the fence line. In one place, he stated he drove the fence lines two to three times

per week. CCR 413 ¶11. In another, Bruce stated that he checked the fence every single morning and every single night. CCR 413 ¶14. One can conclude that fence was monitored only two or three times per week when viewing these inconsistencies in Plaintiff's favor.

Further, to rebut Bruce's testimony that he inspected the fence line around 6:00 am the morning after the collision and found no issues. Plaintiff countered that this inspection took place in the dark, about one and a half hours before the sun rose that day. CCR 410, 413.

- **There is disputed evidence on the ultimate issue of whether Defendants should have reasonably anticipated the danger of a loose cow on the roadway.**

Based upon all the evidence, Dr. Little opined that "Defendants should have reasonably anticipated the danger of a loose cow on the roadway." CCR 552 ¶9. An opinion such as this is not objectionable just because it embraces an ultimate issue. SDCL 19-19-704. This expert evidence directly contradicts the trial court's opposite conclusion that there was no genuine dispute of material fact on the issue. CCR 761, 765-6.

- ii. *The trial court weighed the evidence by giving no credence to information of past cattle escapes and entered findings unsupported by the record.*

The circuit court's ruling that all facts pointed to the Heggens' lack of liability arose from an erroneous weighing of the evidence. Frerk provided evidence of cattle straying and other breaches of the enclosure:

- In 2010, a cow strayed from the pasture and was struck by a vehicle on Highway 11, CCR 436, CCR 555, ¶42, CCR 513;
- Cattle escaped the pasture 6-7 years before Bruce's deposition after a state worker backed through one of the gates, CCR 360;

- One or two cattle escaped onto Highway 11 from the Heggens property, CCR 520; and
- On occasion, neighboring cattle would end up on the Heggens' property when a hot wire was shorted, or a fence post was knocked down, CCR 433, 544.

Viewed in Plaintiff's favor, this evidence supports that people have seen cattle outside of the enclosure since 2010 and that there have been other occasions of escape since that time. It does not support the circuit court's findings that "[t]here is no evidence that people have seen cattle outside of the enclosure since 2010" or that "[t]he last occasion of escape on this pasture was 2010 [and] Bruce did not experience an escape until nine years later." CCR 746.

The trial court did make an "alternative" finding that there was an incident of escape, but that Bruce "took reasonable measures to make sure it did not happen again." *Id.* The bullet pointed evidence above supports that several escapes occurred. But the court's finding that Bruce took measures to make sure it did not happen again has no basis in the evidence. Other than efforts undertaken in response to the 2010 cow-vehicle collision, there was no evidence proffered to show the measures taken by Defendants referred to in the decision.

The undisputed fact that a stray cow resulted in a collision on Highway 11 before the collision in this case. Yet the summary judgment order refused to attribute any weight to this fact at all. Certainly, the weight a fact finder may give this fact will be impacted by how long ago the incident occurred and any fencing improvements made in the meantime

But the trial court's ultimate decision that no facts support a duty breach show that the past escape and resulting collision was set aside entirely.

On the other hand, the lower court reached conclusions unsupported by the evidence. The summary judgment order found that after the 2010 escape, Bruce "repaired and upgraded his fencing. CCR 746. While there is evidence that Bruce upgraded the pasture fencing after the 2010 cow-vehicle collision on Highway 11, there is no evidence in the record that he repaired his fencing after the incident. *See generally* CCR 411–7. Bruce didn't repair the fence after his cow was struck by a car on Highway 11 in 2010 because he "could not find where she had gotten out at." CCR 360. Accordingly, there is no evidence in the record to support that Bruce repaired the fencing after the first vehicle-cow collision since he testified that he could not locate where the fence breach occurred.

The trial court also made another finding unsupported by the record: that Plaintiff's expert concluded fence "disrepair could have caused the cow to somehow push past or crawl under the fence." CCR 747. No evidence supports that Dr. Little opined the cow "crawled" under the fence. Rather, he opined that the barbed wire fence that was loose, sagging, or broken could be breached by a cow walking where the high tensile wire was too high. CCR 553 ¶29, CCR 554 ¶¶33, 38. The language in the summary judgment ruling is at odds with the evidence setting forth Dr. Little's opinion.

iii. The circuit court made an improper credibility determination about the testimony of Frerk's expert witness, Dr. Little.

At the summary judgment stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Credibility of witnesses is in the province of the

fact finder and is not appropriate on summary judgment. *Continental Grain Co. v. Heritage Bank*, 1996 SD 61, ¶ 16, 548 N.W.2d 507, 511.

The lower court characterized Dr. Little's opinion that the fence was in disrepair as "hesitant" in its summary judgment analysis. CCR 747. Dr. Little never used this word in his testimony or affidavit. He simply opined that the cow, more likely than not, escaped from an area of the fence where the barbed wire was in disrepair and the high tensile wire was too high to be effective. CCR 554 ¶39. This assessment of credibility unequivocally shows the trial court judged the strength of Dr. Little's conclusions. The adverse credibility review of Dr. Little was followed by the trial court deciding "no evidence that the fence was in disrepair." *Id.* In other words, the adverse credibility judgment let the court to entirely disregard the affidavit of Dr. Little that the fence of was in disrepair.

In sum, the summary judgment ruling below was predicated on an impermissible credibility assessment of Frerk's expert witness that warrants reversal.

b. The Circuit Court Failed to Apply the Correct Standard Used to Assess Breach of Duty in Cattle-Vehicle Collision Cases.

i. The trial court created a novel and unrecognized two-step analysis in determining whether the Heggens breached their duty of care.

In 1953, this Court first recognized a common law duty to protect others from the hazards of domestic animals on roadways. *Eixenberger*, 75 S.D. at 7, 58 N.W.2d at 238. The standard imposed was "whether a defendant could or could not reasonably have anticipated the occurrence which resulted in the injury" given the character of the highway, kind of traffic thereon, the time of day, and other pertinent facts. *Id.* (citing *Drew v. Gross*, 112 Ohio St. 485, 489, 147 N.E. 757, 758 (1925)).

This standard remains the same to this day. Nonetheless, the circuit court applied a novel, two-step analysis instead of the longstanding standard:

“The breach of duty rule requires a foreseeability element. This would require a showing that Defendants reasonably anticipated that livestock could get on the road due to the manner in which they maintained their fencing, the character of the road, the time of day of the accident, and all other pertinent factors. Then, if the livestock does in fact get on the road as it did here, whether the landowner could reasonably anticipate injury to result.”

CCR 744. This two-step process is at odds with the longstanding rule.

It appears this mistaken approach derived from arguments raised by the Heggens in their briefing and at the motions hearing. *See* CCR 597 (stating “it was not foreseeable that the cow would escape”); CCR 665 (claiming cattle breaching a fence due to a predator is not foreseeable or preventable”); CCR 851 (arguing “there’s no evidence that this type of accident was foreseeable given the fencing used”). Regardless of its origin, “[f]oreseeability in the ‘duty’ sense is different from foreseeability in fact issues bearing on negligence (breach of duty) and causation.” *Smith ex rel. Ross v. Lagow Const. & Developing Co.*, 2002 S.D. 37, ¶ 18, 642 N.W.2d 187, 192. The Order shows the application of foreseeability is bearing upon breach of duty—a question of fact—and not in definition the boundaries of whether a duty should be imposed—a question of law.

The multi-factor, fact-specific inquiry this Court has continually implemented to assess whether a breach of duty has occurred has foreseeability baked into the test. There is no need to determine whether a defendant reasonably anticipated livestock would stray onto a roadway first, and then engage in a secondary analysis about whether injury resulted if an animal did end up on a roadway. Rather, a fact finder should consider all the circumstances at one time to determine whether a breach of duty took place.

Accordingly, the Court's misapprehension of the legal standard when rendering its decision on summary judgment should be reversed.

ii. The circuit court failed to consider traffic conditions on Highway 11 as required by the law.

For 70 years, this Court has required consideration of the traffic on the roadway where an animal-vehicle collision took place to assess whether a defendant breached their duty of care for 70 years. *See Eixenberger*, 75 S.D. at 7, 58 N.W.2d at 238 (citations omitted) (livestock that stray onto a much-traveled highway are apt to cause damage). Almost two decades later, this Court again emphasized the necessity of assessing a road's traffic to determine whether a breach of duty occurred. *Pexa*, 85 S.D. at 40, 176 N.W.2d at 499. The *Pexa* Court approved the consideration of evidence that a pasture near a busy highway used by trucks, on the outskirts of the second largest city in the state, was appropriately considered as proof of negligence. *Id.* at 499; *see also Atkins*, 1999 S.D. 131 at ¶ 23, 600 N.W.2d at 898 (rejecting argument that busy traffic on the highway should not factor into a liability determination)

The evidence proffered by Frerk regarding Highway 11 traffic included:

- Data of South Dakota's traffic flow showing greater than 2500 average daily traffic on the portion of Highway 11 at issue, CCR 563;
- An affidavit from expert witness Dr. Little stating Highway 11 is one of the busiest roads in eastern South Dakota, with average vehicle and truck counts of 6,798 and 347 respectively, CCR 552, ¶¶ 6-7;
- Testimony from Defendant Bruce conceding Highway 11 is very busy, with traffic from cars and tractor trailers day and night, CCR 506-7;
- Testimony from Defendant Leo admitting Highway 11 is getting less rural, CCR 540-1; and
- Testimony from Defendant Leo acknowledging the section of Highway 11 that cuts through the property is about 5 miles from Brandon and about 20 minutes from Sioux Falls, the most populated city in South Dakota, CCR 542.

Busy traffic on the highway is a legally necessary factor to consider when determining whether a defendant should have anticipated an animal might escape. The trial court acknowledged this factor at both at the motions hearing and in its Order, CCR 737–52, 875. But facts relevant to traffic on Highway 11 were disregarded by the lower court. *See generally* CCR 737–52 (omitting discussion of any facts regarding Highway 11 traffic). This was erroneous.

II. The Circuit Court Applied the Incorrect Legal Standard in Assessing Whether the Minnehaha County Ordinances Supported Plaintiff’s Negligence Per Se Claims.

Rather than assessing whether the ordinances were enacted to protect persons in Frerk’s position or to prevent the type of accident that occurred, the Circuit Court imposed a heightened standard tantamount to a private right of action. This was error.

“The violation of a statute enacted to promote safety constitutes negligence per se.” *Baatz v. Arrow Bar*, 426 N.W.2d 298, 300 (S.D. 1988) (citations omitted). The rule of negligence per se has never required the subject law to supply a civil remedy on its face. *Id.* Likewise, the plain language need not detail the class of persons it protects or contemplate injuries to be used as a basis for negligence per se. Instead, the analysis is whether an ordinance was “enacted to protect persons in the plaintiff’s position or to prevent the type of accident that occurred.” *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 42, 980 N.W.2d 251, 263; *see also Albers v. Ottenbacher*, 79 S.D. 637, 116 N.W.2d 529 (1962) (requirement that the law used for a negligence per se claim be “designed for the benefit of a class of persons which included the one claiming to have been injured as a result”). Put another way:

“The violation of a statute or ordinance, designed for the benefit of individuals, is of itself sufficient to prove such a breach of duty as will

sustain an action for negligence brought by a person within the protected class if other elements of negligence concur. The statute or ordinance becomes the standard of care or the rule of the ordinarily careful and prudent person.”

McCleod v. Tri-State Milling Co., 71 S.D. 362, 366–67, 24 N.W.2d 485, 487 (1946),
overruled on other grounds by Hohm v. City of Rapid City, 2008 S.D. 65, 753 N.W.2d
895.

The Circuit Court incorrectly determined neither Minnehaha County Ordinance applied to this case. In reaching this conclusion, the trial court compared the subject ordinances to others³ the court believed provided “rules on the avenue of bringing suit” and thus rose “to the level of establishing a duty.” CCR 750. The trial court determined a law cannot impose any duty for a negligence per se claim unless its language details when one is “liable,” references the right to civil action, creates a protected class, and contemplates injuries, and provides for a remedy of damages. CCR 750-1. Imposing such stringent requirements is error since it is at odds with the recognized standard for negligence per se claims.

Frerk relied upon two different Minnehaha County Ordinances in support of her negligence per se claims. The first is MC 52-17, Section 3.02 of Article III:

³ See generally SDCL 40-28-20 through 40-28-26; see also CCR 750-1 (comparing different Minnehaha County Ordinances).

3.02 RUN AT LARGE/STRAY ANIMAL. No animal shall run at large. An animal shall be declared to be running at large or be declared to be a stray animal whenever such animal is off the premises and not under the immediate physical control of its owner, possessor, keeper, agent, servant, or a member of the immediate family thereof. Whenever an animal is declared to be running at large or declared to be a stray animal, the same shall constitute prima facie evidence that the owner permitted it to run at large or be a stray animal, and the Animal Control Officer, Law Enforcement Officer, or their authorized designee may control and impound the animal, and dispose of the animal as set forth in Article V.

CCR 571, Appx. 120.

This ordinance was enacted to protect the protect the public health, safety, and welfare of the residents of unincorporated Minnehaha County. CCR 567, Appx. 116. Frerk resides at an address that is part of unincorporated Minnehaha County. CCR 70, 437, 468; *see also* SDCL 19-19-201(d) (permitting a court to take judicial notice at any stage of the proceeding) and *Nauman v. Nauman*, 336 N.W.2d 662, 665 (S.D. 1983) (taking judicial notice on appeal of matter of public record). Violations of the ordinance constitute Class 2 Misdemeanors. CCR 578, Appx. 126. Frerk's injuries arise from the cow that was not within the immediate physical control of its owner. CCR 408, 510. Thus, Frerk is the type of person the ordinance is specifically designed to protect.

The second is MC 46-14, Section 1: "illegal obstructions" are "obstructions within the road right-of way unintentionally left on the road right-of-way shall be removed by the owners." CCR 580, Appx. 130. The ordinance provides a non-inclusive list of what may constitute an obstruction but does not define it. *Id.* Unless the person responsible for the obstruction uses diligence to notify the public and applicable authority of anything unintentionally left on the road right-of-way and immediately puts up a danger sign, that person is guilty of a petty offense. *Id.*

The ordinance was enacted to promote safety. The ordinance references the Minnehaha County Highway Department Snow and Ice Removal Policy, which shows the safety focus. “It is the policy of the Minnehaha County Highway Department to remove snow from County roads safely and quickly, and to provide reasonable ice control.” CCR 583. The policy further emphasizes the importance of “protect[ing] the safety, health and welfare of the travelling public.” *Id.* Mrs. Frerk—a member of the travelling public using a Minnehaha County highway in snowy conditions—is precisely the kind of person the statute prohibiting obstructions intended to protect. As such, this ordinance also meets the negligence per se standard.

Because the lower court’s dismissal of Frerk’s negligence per se claims imposed the wrong legal standard, Frerk requests this Court reverse the entry of summary judgment on the claims and remand the case for further proceedings.

CONCLUSION

For the reasons set forth herein, Frerk requests this Court reverse the Circuit Court’s order granting summary judgment on her negligence claims and remand the case to allow a jury to perform the factual inquiry of whether negligence occurred in this livestock-vehicle collision. Furthermore, Frerk requests the Court reverse the circuit court’s order granting summary judgment on her negligence per se claims premised on the Minnehaha County ordinances at issue.

WHEREFORE Plaintiff respectfully requests that this Court reverse the Judgment of the circuit court.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument.

DATED this 5th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Brief of Appellant complies with the type volume limitation set forth in SDLRC Codified Law 15-26A-66(b)(2), and that this Brief consists of 5,980 total words and 29,497 characters with no spaces. I have relied upon the word and character count for the pertinent sections from the word processing system used to prepare this Brief.

DATED this 5th day of November, 2024.

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CERTIFICATE OF SERVICE AND PROOF OF FILING

The undersigned hereby certifies that on the 5th day of November, 2024, a true and correct copy of the foregoing Appellant's Brief was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send email notification of such filing to counsel for the Defendants-Appellees. An original of the above will be mailed to the Clerk of the Supreme Court to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501

DATED this 5th day of November, 2024.

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STATE OF SOUTH DAKOTA)
COUNTY OF MINNEHAHA)

:SS

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

AMBER FRERK,

Plaintiff,

v.

**BRUCE HEGGEN, LEO D.
HEGGEN, and JOANNE B.
HEGGEN,**

Defendants.

49CIV22-2356

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

This matter came on for hearing on March 26, 2024, at the Minnehaha County Courthouse in Sioux Falls, South Dakota, before this Court pursuant to Defendants' Motion for Summary Judgment. Kylie Schmidt of Ogborn Mihm Quaintance, PLLC, appeared on behalf of the Plaintiff, and Ryan Redd of Evans Haigh & Arndt LLP appeared on behalf of the Defendants. The Court having reviewed the entire file; the parties' briefing; statements of undisputed, disputed, and additional facts; proffered exhibits; and oral argument; and taking the issue under advisement, now enters a Decision and Order granting Defendants' Motion for Summary Judgment.

FACTS

The following facts are stated and viewed in light most favorable to the non-moving party, Amber Frerk (Plaintiff).

Leo and Joanne Heggen own land north of Corson, South Dakota. The land is used as pastureland for cattle that are owned by their son, Bruce Heggen (collectively "Defendants"). The pasture that is the subject of this case is located across the street from Bruce's home. Bruce also rents nearby land from a third party. The pasture is adjacent to Highway 11 northeast and northwest of the Highway's intersection with 258th Street. The Highway crosses over Split Rock Creek via a bridge. At this location, the Highway is black asphalt, is not well-lit at night, and does not have cattle guards on the sides of the road where the Heggens'

fencing is at. Cattle from the pasture can navigate along the Creek, which is under the under the Highway 11 bridge, because there is no fencing or other obstructions blocking the cattle from accessing the water.

The Heggen family has used the pasture in some capacity for over 65 years. Bruce has had cattle in the pasture since at least the year 2000. It was typical for cattle to be in the pasture until the end of October or into November. At first, the enclosure was surrounded by five strand barbed wire fencing which was supported by alternating wood and steel posts. Whenever the cattle were inside the pasture, Bruce would routinely check the enclosure to make sure it was operating. Every morning and night, Bruce would check the fencing along Highway 11 to make sure it was working, checking that the fence was taut, and that all gates were secured. With this, Bruce would check to make sure no cattle had escaped and were properly enclosed. When the cattle were not in the pasture, he would not check the enclosure because the cattle were not in there, so it was not needed.

In 2010, a cow had escaped and was struck by a vehicle. It was Bruce's belief that the cow was chased out of the barbed wire enclosure by a mountain lion because multiple cows had been killed by mountain lions and the cow was found on the road with big scratches on its back. After the 2010 incident, Bruce upgraded the fencing by adding high tensile electric wire. The electric wire is situated eighteen inches behind the barbed wire enclosure. Bruce uses a device with light indicators to test the current of the fence. Since then, Bruce had no cattle escape the enclosure of this pasture.

Plaintiff presented evidence of an interview Bruce conducted with Keloland News where he spoke to the mountain lion sightings, saying "where they [the cattle] get out at a broken spot in the fence . . . it's just fifty foot of fence just laid over flat."¹ This news story was published in April 2015. In the video, Bruce was referring to mountain lion sightings that occurred "last spring" which would have been in 2014. Defendants noted that this is during calving season, and Bruce does not calve in the pasture that is the subject of this case.

Bruce first moved the cattle group in question into the pasture on May 30, 2019. They were removed in June, and then returned on July 31 until October 14. The group was one-hundred and four calf-cow pairs and five bulls. On October 12, 2019, Bruce checked the fence line in the morning, and all livestock were accounted for inside the enclosure. He did the same in the evening and everything was operating smoothly. The parties generally agree that the cow must have escaped during this evening after Bruce had checked everything and gone to his home.

¹ Plaintiff proposed this exhibit to the Court via a supplemental brief after the hearing was held. Defendants argued in response that Plaintiff's supplemental brief was untimely under SDCL 15-6-56(c) and argued that it was irrelevant and immaterial.

The same day, Plaintiff went to a concert with friends at the Denny Sanford Premier Center in Sioux Falls. On the way to the concert between 6:00 to 7:00 P.M., Plaintiff picked up her friend, Katie Sundstrom, from her home and proceeded on Highway 11 to Interstate-90 and on to get to the concert. Plaintiff nor Katie personally observed any cattle outside the enclosures at this time.

After the end of the concert, the two drove back on the same route to drop Katie off at home. As Plaintiff crossed the bridge over Split Rock Creek, she struck a black angus cow which resulted in her injury which is the basis for her lawsuit.

On this night, it was dark but also rainy and snowy. The road did not have "Cattle Crossing" or any other indicators that cattle could enter the road space. The year 2019 presented an unusually "wet" year with higher levels of precipitation than usual. Bruce's wife had taken pictures of the flooding around the land. Split Rock Creek's water levels were found to have risen significantly, which would require the enclosure to be repaired several times. Repairs happened, although there are no records of repair in this case.

Bruce received a call around 1:00 A.M. on October 13 from a Minnehaha County Sheriff's Deputy telling him that one of his cattle got struck on the bridge. Bruce got his payloader and got the cow off the road. Bruce ensured the fencing was in working order, made sure no other cattle had escaped, made sure the electric current was still active, and made sure all gates were closed. Bruce checked everything later in the morning of October 13 and confirmed that everything was in working order.

Plaintiff filed suit in 2022. She asserts that the black angus should have been properly confined by Defendants and they failed to maintain a proper enclosure which allowed it to escape. For this assertion, she cites numerous reasons why, including the wet year and need for repairs, the makeup of the fencing near the bridge, a black angus generally cannot jump over a fence, and inadequacies in Bruce's upkeep and maintenance. Plaintiff asserts that Defendants should have reasonably anticipated the danger of cattle exiting the enclosure and entering the highway space causing a dangerous risk to motorists. Plaintiff's particular arguments are discussed further below.

The parties have since conducted discovery, including requests for admissions, interrogatories, depositions, and Plaintiff's obtainment of an expert, Dr. Daniel Little, DVM. Of note, Dr. Little twice visited the pastureland in 2023 and noted that the fence's materials were satisfactory, but the configuration of the fence in relation to the topography was concerning. Dr. Little also discussed the height differences between the barbed wire fence and the electric fence near the bridge, and how these height differences were improper. His conclusion was that the cow could have escaped by going through or under the fence. He stated that this could

have been the source of the scratches on the cow's back in 2010 instead of claw marks. He found it unlikely that a cow could jump the fence.

At the summary judgment stage, Plaintiff also noted Defendants' responses to her Requests for Admission, where Defendants objected and denied that a cow owned by Bruce went under a fence of the enclosure where cows were kept on May 18, 2019. Defendants responded that this was not the same pasture, not the same fencing, not close to a highway, and was merely a calf that was stuck under a fence. Plaintiff also notes the next response where she asked Defendants to admit that "two COWS owned by Bruce Heggen were found on a neighbor's property outside the fenced enclosure where COWS were kept on October 14, 2019." Defendants again objected and denied the statement, arguing similar to above and adding that this was an instance of the owners' bulls fighting with affected fencing between the neighboring properties and as a result calves got into the neighbor's property. See generally, *Affidavit of Kylie M. Schmidt*, Exhibit 17. In their Reply Brief, Defendants also argued that this occurred after the incident in question which diluted its significance.

Moving for summary judgment, Defendants argue that there is no genuine dispute of material fact as to any of Plaintiff's claims. Plaintiff argues there is evidence showing that a genuine dispute of material fact exists and that this case should go to a jury.

DECISION

The South Dakota Legislature has instructed courts that a motion for summary judgment must be granted:

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

SDCL 15-6-56.

When considering a motion for summary judgment, this Court must "view the evidence most favorably to the nonmoving party and resolve reasonable doubts against the moving party." *State by and through Dep't of Transp. v. Legacy Land Co.*, 2023 S.D. 58, ¶ 18, --- N.W.2d ---- (quoting *Yankton Cnty. v. McAllister*, 2022 S.D. 37, ¶ 15, 977 N.W.2d 327, 334). "The nonmoving party . . . must present specific facts showing that a genuine, material issue for trial exists." *Id.* (quoting

Sacred Heart Health Servs., Inc. v. Yankton Cnty., 2020 S.D. 64, ¶ 11, 951 N.W.2d 544, 588). “[T]he nonmoving party to a summary judgment motion may not sit idly by where the moving party has established a prima facie case for granting the motion.” *Id.* (quoting *Kimball Inv. Land, Ltd. v. Chmela*, 2000 S.D. 6, ¶ 17 n.3, 604 N.W.2d 289, 294 n. 3).

Also, this Court must “credit the evidence offered by . . . the non-moving party, and any reasonable inferences it supports. To do so otherwise would require [the Court] to weigh conflicting evidence – a practice which is, of course, categorically proscribed for courts considering motions for summary judgment.” *Mullenson v. Markve*, 2022 S.D. 57, ¶ 39, 980 N.W.2d 662, 674.

“[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated” *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). “We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party.” *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (citation omitted).

We require those resisting summary judgment to show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.” *Foster-Naser v. Aurora Cnty.*, 2016 S.D. 6, ¶ 11, 874 N.W.2d 505, 508 (citation omitted). “A sufficient showing requires that ‘[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.’” *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (citation omitted). “Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment.” *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63.

Godbe v. City of Rapid City, 2022 S.D. 1, ¶¶ 20-21, 969 N.W.2d 208, 213.

“Summary judgment is generally not feasible in negligence cases because the standard of the reasonable man must be applied to conflicting testimony.” *Wilson v. Great Northern Ry. Co.*, 83 S.D. 207, 212-13 (S.D. 1968) (citing 3 Barron & Holtzoff, *Federal Practice & Procedure*, Rules Ed., § 1232.1). “Issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against a claimant and should be resolved by trial in the ordinary matter.” *Id.* (citing 6 Moore’s *Federal Practice*, 2d Ed., § 56.17(42)). The South Dakota Supreme Court “has repeatedly said that issues of negligence . . . are ordinarily questions of facts and it

must be a clear case before a trial judge is justified in taking these issues to the jury." *Id.*

"Even though summary judgment is rare in negligence cases," our Supreme Court has "held that the determination of whether a duty exists is a question of law for the courts." *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 14, 714 N.W.2d 84, 88 (quoting *Bordeaux v. Shannon County Schools*, 2005 S.D. 117, ¶ 11, 707 N.W.2d 123, 126). "The inquiry involves whether 'a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff.'" *Id.* (quoting *Estate of Shuck v. Perkins County*, 1998 S.D. 32, ¶ 8, 577 N.W.2d 584, 586). "Landowners have a duty of care regarding their roaming animals." *Id.* (quoting *Atkins v. Stratmeyer*, 1999 S.D. 131, ¶ 23, 600 N.W.2d 891, 898). "Once the duty is determined, whether a breach of that duty occurred is for the finder of fact, not this Court." *Id.*

I. Plaintiffs' Negligence Claim.

a. *Defendants Had a Common Law Duty of Care Regarding the Cattle as a Matter of Law.*

Defendants had a duty of care in this case. "[T]he determination of whether a duty exists is a question of law for the courts." *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 14, 714 N.W.2d 84, 88 (citing *Bordeaux v. Shannon County Schools*, 2005 S.D. 117, ¶ 11, 707 N.W.2d 123, 126). "The inquiry involves whether 'a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff.'" *Casillas*, 2006 S.D. 42, ¶ 14, 714 N.W.2d at 88 (quoting *Estate of Shuck v. Perkins County*, 1998 S.D. 32, ¶ 8, 577 N.W.2d 584, 586).

Plaintiff cites the South Dakota Supreme Court's decision in *Casillas v. Schubauer*, 2006 S.D. 42, 714 N.W.2d 84, which provides a common law standard of care for landowners with animals on their property. The case involved a similar fact pattern, where the plaintiffs collided with a black angus bull owned by the defendant. *Id.* ¶ 1, 714 N.W.2d at 87. The Court reiterated that "[l]andowners have a duty of care regarding their roaming animals." *Id.* ¶ 14, 714 N.W.2d at 88 (quoting *Atkins v. Stratmeyer*, 1999 S.D. 131, ¶ 23, 600 N.W.2d 891, 898).

This Court recognizes and reaffirms a common law duty for landowners regarding their livestock as a matter of law. This Court determines that Defendants in this case had a common law duty of care regarding their livestock. The questions of whether they breached their duty, whether their breach caused Plaintiffs injury, and whether Plaintiff suffered damages, are questions of fact for

the jury, barring that there is no genuine dispute of material fact and that Defendants are entitled to a judgment as a matter of law.

b. There Is Not a Genuine Dispute of Material Fact as to Defendants Breaching Their Duty of Care Because They Could Not Have Reasonably Anticipated That the Black Angus Cow Would Stray onto Highway 11 and that Injury Would Result.

When determining whether the landowners breached the established duty of care, a fact finder must determine whether the landowners should have reasonably anticipated that injury would result from their animal(s) being on a highway. *Casillas*, ¶ 14, 714 N.W.2d at 88.

“In personal injury cases arising out of collisions between vehicles and domestic animals, this Court has explained:

‘At common law an owner of a domestic animal is under no legal obligation to restrain it from being at large on the highway unattended, and he is not liable for damages for an injury resulting from its being so at large unless he has knowledge of vicious propensities of the animal or unless he *should reasonably have anticipated that injury would result from its being so at large on the highway.*’²

Id. ¶ 15, 714 N.W.2d at 88-89 (emphasis original) (quoting *Atkins*, 1999 S.D. 131, ¶ 23, 600 N.W.2d at 898). This rule used to only apply to animals “at large”, but now it applies to “cases involving negligent maintenance of fences or other forms of confinement.” *Id.*

The narrower inquiry within this issue has the fact finder look at:

[t]he facts of [the] case and consider the character of the road, the kind of traffic thereon, the time of day, and all other pertinent facts and the surrounding conditions to determine whether the defendant should have reasonably anticipated the danger.

Id. ¶ 16, 714 N.W.2d at 89 (quoting *Atkins*, 1999 S.D. 131, ¶ 23, 600 N.W.2d at 898). The Supreme Court has explicitly stated that this inquiry – determining whether landowners breached their duty of care regarding animals – “depends upon whether the landowner could have reasonably anticipated the danger in light of all the facts

² See also South Dakota Civil Pattern Jury Instruction 20-80-70 (“An owner or person in charge of livestock must exercise ordinary care to keep the livestock off highway rights-of-way if the owner or person should reasonably anticipate that the animals are likely to damage persons or property by being on the highway.”).

and circumstances. This inquiry is a factual one and should be decided by the jury.” *Id.* ¶ 17, 714 N.W.2d at 89.

The breach of duty rule requires a foreseeability element. This would require a showing that Defendants reasonably anticipated that livestock could get on the road due to the manner in which they maintained their fencing, the character of the road, the time of day of the accident, and all other pertinent factors. Then, if the livestock does in fact get on the road as it did here, whether the landowner could reasonably anticipate injury to result.

The Court first considers the facts viewed in light most favorable to Plaintiff under the factors provided in *Casillas*. As to the character of the road, it is a rural highway; the road is black asphalt; the road was wet and/or snowy; the bridge did not have street lighting; there were no “Cattle Crossing” signs available for drivers; and there were no cattle guards near the road. As to the time of day, Plaintiff was driving at night when it was dark outside. As to all other pertinent factors, the accident occurred on a bridge over a creek. Under the bridge, the cattle are unrestricted from navigating along the creek. Plaintiffs also note the topography of the pastureland surrounding the bridge, with small bluffs changing the configuration of the perimeter of the fence line.

As a supporting argument, Plaintiff argues that trial courts “routinely” allow cases like this to reach juries. She cites cases on Pages 8-11 of her brief which support the proposition that negligence cases with cars striking animals typically go to a jury. First of relevance is *Zeeb v. Handel*, 401 N.W.2d 536 (S.D. 1987) where the Supreme Court reversed a grant of summary judgment, like *Casillas*. This is despite the moving party showing that they always maintained their fences. *Id.* at 536-37. Second is *Atkins v. Stratmeyer*, 1999 S.D. 131, 600 N.W.2d 891, where the case went to trial and dealt with similar fact pattern of both sides having trouble trying to show how exactly the animals left their enclosure. *Id.* at 893-94. Like this case, expert testimony provided a theory as to how the animals left – via an open gate – and the Court concluded that a jury could logically find that the animals left via a gate, despite the lack of more specific factual indicators. *Id.* at 899-900. Last cited is *Pexa v. Clark*, 176 N.W.2d 497 (S.D. 1970), where the case went to trial and the Supreme Court upheld the jury verdict in favor of the plaintiffs who struck horses on a highway.

In *Casillas*, the Supreme Court reversed a grant of summary judgment on the issue of whether the landowner defendant breached his duty of care. *Id.* ¶ 23, 714 N.W.2d at 90. Considering similar facts to this case, the Court noted that the ultimate inquiry as to breach is “whether Schubauer should have reasonably anticipated that his black bull would stray onto Highway 83.” *Id.* ¶ 18, 714 N.W.2d at 89. The Court considered the following:

Schubauer did not allow his livestock to roam at large. His property is enclosed by fence. Casillas and Stickelman did not present facts indicating that Schubauer negligently maintained his fence. Nor do they set forth facts indicating that Schubauer left the fence gates open on the day of the accident.

Schubauer does admit, however, that this was not the first time the black bull escaped from a corral. On a prior occasion, Schubauer confined the black bull and another bull in close quarters. The two bulls started fighting and the black bull was able to break through the fence. Schubauer testified in regards to bulls and their propensity to challenge one another as follows:

Q: Now you said you had that problem at one time with that big bull and the little bull; do bulls fight often?

A: I don't know if you call it fighting or playing, but they—boys will be boys I guess. I don't know what you call it.

Q: They challenge each other, right, or how would you describe it?

A: I guess that's what you would say. I don't know. They just butt heads and the bigger one usually wins and pushes the little one away, and if he's too much bigger the little one runs away.

On the day of the accident, Schubauer put the black bull, another bull, and some cattle in the corral. He does not recall checking on the bulls that afternoon or evening despite the fact that the corral can be seen from his house. The black bull was observed on the highway by 6:30 p.m. The accident occurred at 11:00 p.m. The black bull was not found until 7:30 or 8:00 the following morning.

Id. ¶¶ 19-21, 714 N.W.2d at 89-90.

The Court found that a genuine issue of material fact existed as to whether the defendant breached his duty of care – or, more specifically, whether he could have reasonably anticipated the black bull would escape and stray onto the highway. *Id.* ¶ 22, 714 N.W.2d at 90. The Court reasoned:

Schubauer knew that bulls had a propensity to challenge one another. He also knew the black bull escaped from a corral when confined with another bull on a prior occasion. Despite the fact that the bulls were confined and Schubauer's home was near a major highway, he did not check on the bulls until the following morning. Viewing these facts and

inferences in the light most favorable to Casillas and Stickelman, a jury should determine whether Schubauer could have reasonably anticipated the black bull's escape and the likelihood of an accident.

Id.

At the hearing, Plaintiff's counsel acknowledged that *Casillas* does not represent a proposition that summary judgment must never be granted on these issues. The parties also acknowledged at the hearing that these cases are the four primary binding authorities this Court must consider.

This case is unlike *Casillas* for the main fact that there was no argument of negligent maintaining of fencing. The main concern for our Supreme Court was the fact that there was evidence of the landowner allowing two bulls to be in an enclosure together, which invites fighting and escape. Bruce had bulls together, but that is not at issue in this case. The defendant in *Casillas* had a recent occasion where he put two bulls together and they fought and escaped. Despite this recent occasion, he placed them together and did not check on them until the following morning. There is a clear string of facts in *Casillas* that warranted a jury trial. There is none here. The last occasion of escape on this pasture was 2010. Bruce repaired and upgraded the fencing and did not experience an escape until nine years later. He did not have a recent kerfuffle where he could have learned from a mistake and fixed it after to avoid the same consequences. In the alternative, he had an incident of escape and took reasonable measures to make sure it did not happen again. Plaintiff cites other incidents, such as fishermen cutting the fencing to access the property and cattle escaping enclosures within the interior of the property. However, fishermen are uncontrollable, intervening forces and the cutting of fences was not at issue here. Also, instances of the cattle escaping enclosure within the interior of the property did not occur in the pasture in question.

In *Zeeb*, affidavit evidence showed the defendant had not maintained their fencing for thirteen years and that cattle escaped the day before the car accident. 401 N.W.2d at 537. There is nothing the same here. On the one occasion where an escape occurred in the pasture in question, Bruce repaired and upgraded his fencing. Plaintiff's expert acknowledged that the fencing itself was standard. Bruce routinely checked the fencing multiple times a day, not just to give it the "eye test" but also checking the electric current. When flooding occurred in 2019, Bruce apparently made several repairs to the fence. There is no evidence that people have seen the cattle outside of the enclosure since 2010. This case is clearly distinguishable from *Zeeb*.

The defendants in *Atkins* had three horses that escaped from an enclosure, and the trial had competing experts who both agreed that the likely cause was an

opened gate. 1999 S.D. 131, ¶¶ 2-3, 600 N.W.2d at 893-894. The negligence issue in *Atkins* also had a different standard of review on appeal, where the Court affirmed the circuit court's denial of both a judgment notwithstanding the verdict and insufficiency of the evidence motions, viewing in light most favorable to the verdict. *Id.* ¶ 27, 600 N.W.2d at 899. Contrarily, this case has Plaintiff's expert agreeing that the fence materials were proper and hesitantly concluding that disrepair could have caused the cow to somehow push past or crawl under the fence. Plaintiff's distinguishment is misplaced because while the fence was in good shape in *Atkins*, experts from both sides agreed that the most likely route of escape was a gate, and the defendant was the last one to close the gate. *Id.* ¶ 29, 600 N.W.2d at 899-900. Here, we have no evidence that the fence was in disrepair, other than speculation as to why it *may* have been in disrepair, and there is no reasonable dispute that a gate was left open.

The *Pexa* case had evidence shown at trial that the horses had been seen out of their enclosure several times, including on the highway, and witnesses would help the defendant bring the horses back. 176 N.W.2d at 498-99. There is no affidavit testimony or other evidence showing that cattle were seen outside of the pasture in question. There is no affidavit testimony or other evidence showing that people had to help bring cattle back into the enclosure.

In this case, there is no genuine dispute of material fact as to whether Defendants breached their duty of care. Plaintiff posits theories as to what happened, but simply determining *how* the cow left the enclosure is a logical step behind the determination of whether Defendants were *responsible* for the cow leaving the enclosure. There is no dispute that all gates were shut. There is no evidence in the record of the fence being pushed over, and there is no indication that the cow had barbed wire cuts or other indicators of a struggle with the fence, as Dr. Little speculated in his testimony regarding the 2010 incident. Evidence shows that Bruce checked on the fence multiple times a day, and when he needed to make repairs, he did so. Evidence shows that Bruce checked the enclosure on the morning of the incident and on the night of the incident, ensuring all cattle were accounted for and the enclosure was in working order.

This case lacks the substantive and probative evidence that other cases that went to trial had. Other cases involving car accidents and livestock show that a genuine dispute does not need to be astounding, considering most of the time people cannot see how livestock escaped and sometimes cannot find evidence of escape. Thus, circumstantial evidence plays a large role. In this case, any circumstantial evidence in Plaintiff's favor may support standalone factual assertions, but they fail to raise a genuine dispute of how the cow escaped, let alone how Bruce negligently maintained the enclosure. The South Dakota cases had affidavit testimony, live witnesses, agreeing experts, documented history, or other pieces of evidence that would have painted a proper picture for a jury to make a decision. While any and

all hesitation should lean toward Plaintiff as the non-moving party, there is no hesitation here. Plaintiff has failed to provide facts in genuine dispute pointing toward Defendants' negligence. The Court does not discount the injuries suffered in this case. It is unfortunate and bewildering that the black Angus escaped and there is nothing to show for it. But, when looking at the liability aspect, all facts point toward Defendants' carefully maintaining the fencing with multiple daily checks, repairs when needed, and upgrades when needed.

Plaintiff has failed to present sufficient evidence to establish a genuine dispute of material fact and Defendants are entitled to a judgment as a matter of law. The Motion for Summary Judgment as to the claim of negligence is hereby GRANTED.

II. The Minnehaha County Ordinances Do Not Establish a Cause of Action for Negligence Per Se.

Alternatively, Plaintiff argues that two Minnehaha County Ordinances establish a negligence per se action. The Court disagrees.

To reiterate, "the determination of whether a duty exists is a question of law for the courts." *Casillas*, 2006 S.D. 42, ¶ 14, 714 N.W.2d at 88. Moreover, determining whether facts meet the qualifications of a statute or regulation for purposes of negligence per se is a legal question of interpretation. *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 44, 980 N.W.2d 251, 263 (citing *City of Onida v. Brandt*, 2021 S.D. 27, ¶ 27, 959 N.W.2d 297, 303).

"Negligence per se is not equivalent to the four elements of negligence." *Stensland v. Harding County*, 2015 S.D. 91, ¶ 10, 872 N.W.2d 92, 95-96 (citing *Negligence per se*, Black's Law Dictionary (10th ed. 2014) ("Negligence established as a matter of law, so that breach of the duty is not a jury question. Negligence per se usually arises from a statutory violation.")). Negligence per se is "only 'sufficient to prove such a breach of duty as will sustain an action for negligence brought by a person within the protected class if other elements of negligence concur.'" *Davies*, 2022 S.D. 55, ¶ 44, 980 N.W.2d at 263 (quoting *Hendrix v. Schulte*, 2007 S.D. 73, ¶ 17, 736 N.W.2d 845, 849). Negligence per se is wholly separate from strict liability. *Davies*, 2022 S.D. 55, ¶ 44, 980 N.W.2d at 263.

"[A] '[v]iolation of [a] statute alone is not sufficient to render [defendant] liable to the plaintiff. Before [defendant] may be held to respond in damages it must further appear that [defendant's] violation of the duty placed upon [defendant] by this rule was the proximate cause of plaintiff's injury.'" *Stensland*, 2015 S.D. 91, ¶ 10, 872 N.W.2d at 96 (quoting *Thompson v. Summers*, 1997 S.D. 103, ¶ 18, 567 N.W.2d 387, 394 (internal citation omitted)). In addition, the Supreme Court has

explained that “where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff’s position or to prevent the type of accident that occurred, and the plaintiff can establish his relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law.” *Davies*, ¶ 43, 980 N.W.2d at 263 (quoting *Lovell v. Oahe Elec. Co-op.*, 382 N.W.2d 396, 397–98 (S.D. 1986)). “The reason for this rule is that the statute or ordinance becomes the standard of care or conduct to which the reasonably prudent person is held.” *Id.* (quoting *Alley v. Siepman*, 87 S.D. 670, 674, 214 N.W.2d 7, 9 (1974)).

There is no question that, in a general sense, a County Ordinance could potentially create a standard of care, a protected class of individuals, and contemplate an injury as a result. In this case, Plaintiff asserts that Minnehaha County Ordinances 52-17 and 46-14 create a duty of care, Defendants had this duty, Defendants violated the statute and thus breached this duty.

Minnehaha County Ordinance 52-17, Article III, Section 3.02 provides:

3.02 RUN AT LARGE/STRAY ANIMAL. No animal shall run at large. An animal shall be declared to be running at large or be declared to be a stray animal whenever such animal is off the premises and not under the immediate physical control of its owner, possessor, keeper, agent, servant, or a member of the immediate family thereof. Whenever an animal is declared to be running at large or declared to be a stray animal, the same shall constitute prima facie evidence that the owner permitted it to run at large or be a stray animal, and the Animal Control Officer, Law Enforcement Officer, or their authorized designee may control and impound the animal, and dispose of the animal as set forth in Article V.

This ordinance provides a general prohibition of animals running at large, the definition of such, and an authorization of law enforcement to remove or impound the animal. This ordinance may create a duty of care, but it does not create a protected class of citizens or contemplate an injury that would result from a breach of such care. Instead, it defines what an animal at large is, which if an animal is defined as such, authorities will have an onus to act on it. The statute does not contemplate car accidents, injuries from car accidents or anything involving a third party. The statute does define livestock,³ but livestock is not otherwise mentioned unless it is grouped within the general definition of animal.

³ See Minnehaha County Ordinance 52-17, Article I, Section 1.02 “Livestock and Poultry” (“Livestock includes but is not limited to . . . cattle[.]”).

Ordinance 46-14 generally prohibits obstructions on rights-of-way that are either intentionally or unintentionally left there for purposes of general public health, safety, and welfare. The Ordinance was made “pursuant to SDCL 31-32-3.1⁴ and consistent with the Minnehaha County Highway Department Snow and Ice Removal[.]” There may be an argument that this ordinance creates a duty of care, however it does not address livestock in its non-inclusive list of examples (“hay bales, vehicles, or fences”). Minnehaha County Ordinance MC46-14, p. 1, Section 1. Language in the ordinance suggests that its purpose was toward snow removal: “authorization to remove obstructions and to prohibit the placement of snow from private driveways onto Minnehaha County Highway right-of-ways[.]” *Id.* p. 1. To put it simply, the ordinance appears to clearly create a duty of care as to *inanimate objects* that are either intentionally or unintentionally obstructing the roadway. It considers hay bales, vehicles, and fencing as examples. Even further, it has separate sections that delve deeper into hay bales, vehicles, and fencing. It does not address livestock, animals, or living beings. It does not contemplate the danger of livestock being on the road.

As an example of a statutory scheme that does provide for liability is SDCL Chapter 40-28, which provides:

It is a petty offense for the owner or person in charge of any stallion over the age of eighteen months, or any bull over the age of ten months, or any ram or boar over the age of eight months to permit the same to run at large.

SDCL 40-28-1.

For the purpose of §§ 40-28-1 and 40-28-2 the term “running at large” shall mean *intentionally* left outside of the [e]nclosure of a legal fence, and off of the lands owned or controlled by the owner of such animal.

SDCL 40-28-3 (emphasis added) (alteration added).

Except as in this chapter otherwise provided, any person owning or having charge or possession of any buffalo, horses, mules, cattle, goats, sheep, or swine that trespass upon the land, either fenced or unfenced, owned by or in possession of any person, or being cropped by any person injured by such trespass, is liable to any such person injured for all damages sustained by reason of the trespass. No person is liable under this chapter if the person injured has maintained an inadequate partition fence and notice thereof has been given pursuant to § 43-23-

⁴ “No person except as provided in § 31-32-3.2 may intentionally dump any load of any material or cargo on or within the highway right-of-way. A violation of this section is a Class 1 misdemeanor.” SDCL 31-32-3.1. This clearly does not contemplate animals or animals on roads.

5 or if the person is not required to build the fence because of frozen earth pursuant to § 43-23-7.

SDCL 40-28-4.

Damages under § 40-28-4 may be recovered in a civil action, in any court having jurisdiction thereof in the county where such damage may have occurred, and the proceedings shall be the same as in other civil actions, except as modified in this chapter.

SDCL 40-28-18. In addition, SDCL 40-28-20 through 40-28-26 provide more rules on the avenue of bringing suit.

Ordinances 52-17 and 46-14 clearly do not rise to this level of establishing a duty, creating a protected class of persons and contemplating injuries like this statutory scheme does.

The proffered ordinances do not apply to this case because they do not create a standard of care, do not create a protected class of persons, and do not contemplate injuries to the protected class of persons. For this reason, Defendants' Motion for Summary Judgment is hereby GRANTED as to the claim of negligence per se.

III. The Application of Res Ipsa Loquitor.

Plaintiff adds an additional alternative claim of res ipsa loquitor.

"The essential elements to warrant application of the doctrine of *res ipsa loquitor* are: (1) the instrumentality which caused the injury must have been under the full management and control of the defendant or his servants; (2) the accident must be such that, according to knowledge and experience, does not happen if those having management or control had not been negligent; and (3) the plaintiff's injury must have resulted from the accident." *Casillas*, 2006 S.D. 42, ¶ 24, 714 N.W.2d at 90 (quoting *Wuest v. McKennan Hospital*, 2000 S.D. 151, ¶ 18, 619 N.W.2d 682, 688). "Also, the doctrine of *res ipsa loquitor* is to be utilized sparingly and only when the facts and demands of justice make its application essential." *Id.* (quoting *Wuest*, 2000 S.D. 151, ¶ 18, 619 N.W.2d at 688).

"There is a split of authority as to whether and to what extent the doctrine of *res ipsa loquitor* applies to cases involving collisions between motorists and domestic animals." *Id.* ¶ 25, 714 N.W.2d at 90 (citing 29 A.L.R.4th 431, *Collision With Domestic Animal*, §§ 8(a),(b)). "*Res ipsa loquitor* is primarily a rule of

evidence." *Id.* (quoting *Roster v. Inter-State Power Co.*, 58 S.D. 521, 237 N.W. 738, 741 (1931)).

In *Casillas*, the Supreme Court reversed a full grant of summary judgment because there was a genuine issue of material fact as to whether the defendant breached his duty to the plaintiffs. *Id.* ¶ 23, 714 N.W.2d at 90. As to the application of *res ipsa loquitur*, the Court ultimately found that:

[b]ecause the circuit court granted summary judgment, it did not have the opportunity to rule on the doctrine's applicability to the present case. Therefore, it is for the circuit court to determine whether *Casillas* and *Stickelman* are entitled to an instruction on *res ipsa loquitur* in light of the substantive law and the evidence at trial.

Id.

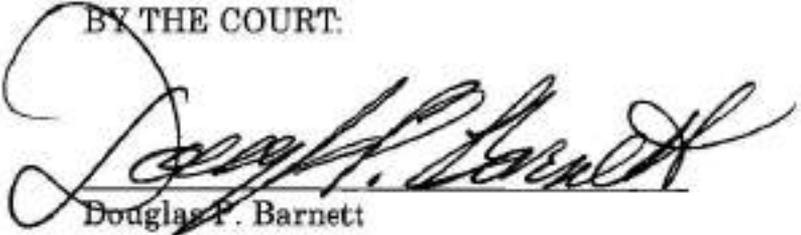
Under this language, and because this Court grants summary judgment as to both common law negligence and negligence per se, the applicability of the doctrine of *res ipsa loquitur* and a potential instruction of it at trial is rendered moot and the Court need not address its applicability at this stage.

ORDER

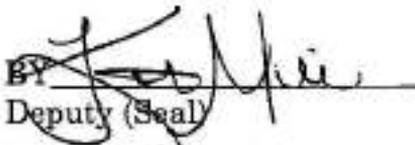
Based upon the foregoing Memorandum Decision, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment is GRANTED as to the issues of liability for negligence, negligence per se and *res ipsa loquitur*. This Order specifically incorporates the Court's Memorandum Decision into this Order.

Dated this 25th day of June 2024.

BY THE COURT:


Douglas P. Barnett
Circuit Court Judge

ATTEST:
ANGELIA M. GRIES,
Clerk of Courts

BY 
Deputy (Seal)



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¶ 8, Ex. 7 (Accident Report).

4. As she was driving north on Highway 11, she passed 258th Street and approached the bridge that runs over Split Rock Creek. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 19: 2 – 9).

5. Plaintiff then collided with a cow on the bridge. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 19: 2 – 9).

6. It is Plaintiff's contention that Defendants are responsible for the accident simply because the cow was out of its enclosure. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 33: 23 – 34: 5).

7. That night, after the accident, neither Plaintiff nor Sundstrom saw any other cattle outside of the enclosure, any gates open, or any issues with the fencing. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 27: 3 – 8, 126: 14 – 127: 7); Redd Aff. ¶ 4, Ex. 3 (Sundstrom Depo. at 24: 17 – 25).

8. Neither Plaintiff nor Sundstrom know how the cow escaped. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 34: 6 – 14; 127: 4 - 11); Redd Aff. ¶ 4, Ex. 3 (Sundstrom Depo. at 24: 14 – 15).

9. Plaintiff does not know where the cow was enclosed before the accident; Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 34: 6 – 14; 127: 4 - 11).

10. Plaintiff does not know where the cow escaped from its enclosure. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 34: 6 – 14; 127: 4 - 11).

11. Plaintiff also does not have any personal knowledge of whether any gates in the area were open or closed. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 127: 12 – 4).

12. Plaintiff does not know the time of day the cow escaped, or how long it was out prior to the accident. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 127: 15 – 16).

13. Plaintiff is also not aware of whether any other cattle had escaped from Defendant Bruce Heggen or Defendant Leo Heggen's fields in the past. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo.

at 128: 7 – 10).

14. The day after the accident, Plaintiff drove by the scene of the accident and did not notice any issues with the fencing or cattle outside of the enclosure. Redd Aff. ¶ 3, Ex. 2 Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 27: 11 – 13; 28: 6 – 9).

15. Plaintiff has driven by the area where the accident occurred approximately every day for the last 18 years, and has never seen cattle outside of their enclosure, other than the cow she struck on October 12, 2019. Redd Aff. ¶ 3, Ex. 2 (Frerk Depo. at 28: 11 – 29: 3; 29: 21 – 30: 2; 30: 3 – 5; 31: 4 – 10).

16. The cow that Plaintiff struck was enclosed in a pasture located adjacent to Highway 11 and across the street (258th Street) from Bruce Heggen’s home (hereinafter the “Pasture”). Bruce Aff. ¶ 2; Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 33: 23 – 25).

17. The perimeter of the Pasture is enclosed with 5-strand barbed wire fence and a high tensile electric wire that is set back 18” from the barbed wire fence. Bruce Aff. ¶ 8.

18. The electric wire is equipped with lights that flash to show that the electric fence is working. Bruce Aff. ¶ 8.

19. In 2019, Bruce moved the cattle, including the cow that was struck by Plaintiff, into the Pasture for the first time on May 30. Bruce Aff. ¶ 12. The cattle remained in the pasture until June 16. Bruce Aff. ¶ 12. The cattle would have returned to the pasture on approximately July 31, 2019, and remained there until October 14. Bruce Aff. ¶ 12.

20. In 2019, as he did every year, before rotating the cattle into the Pasture, Bruce checked the fences to make sure the barbed wire fence was up, the wires are tight all the way around, and that they are all attached to their posts. Bruce Aff. ¶ 13.

21. In 2019, before rotating the cattle into the Pasture, Bruce also checked the electric

fence to ensure it was electrified and that it worked all the way around the whole field. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 33: 1 – 5); Bruce Aff. ¶ 13.

22. Bruce regularly checked the fence while the cattle were in the Pasture. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 41: 10 – 14); Bruce Aff. ¶ 13.

23. Every morning, night, and any time he drove down Highway 11, Bruce checked the Pasture to ensure the cattle were in the enclosure, the fences, including the electric fence, were in place and working as intended, and the gates were closed. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 31: 13 – 23); Bruce Aff. ¶ 13.

24. On October 12, 2019, Bruce checked the fence around the Pasture in the morning to ensure it was in place and operating as intended. Bruce Aff. ¶ 14.

25. On the morning of October 12, 2019, all 104 calf-cow pairs and 5 bulls were in the pasture. Bruce Aff. ¶ 14.

26. Bruce checked the fencing of the Pasture multiple times on October 12, 2019, as he drove past the Pasture. Bruce Aff. ¶ 14.

27. Prior to nightfall on the evening of October 12, 2019, Bruce checked the Pasture to ensure the fence was in place, that the electric fence was working, and that the cows were all enclosed—just as he did every evening when the cows were out to pasture. Bruce Aff. ¶ 14.

28. On the evening of October 12, 2019, all of the fencing was in place, the electric fence was operational, the gates were closed, and all 109 head of cattle and their calves were within the enclosure. Bruce Aff. ¶ 14.

29. At approximately 1:00 a.m. on the morning of October 13, 2019, a Minnehaha County Sheriff deputy contacted Bruce to inform him that he may have had a cow get hit on the highway. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 37: 11 – 18; 39: 1 – 9); Bruce Aff. ¶ 15.

30. Bruce went to the scene of the accident, saw the cow, and went home to get his payloader to pull the cow off the road. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 38: 8 – 10).

31. At approximately 1:30 a.m. on October 13, 2019, Bruce checked all of the fencing at the Pasture and confirmed no other cattle had escaped. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 39: 1 – 7); Bruce Aff. ¶ 15.

32. During his inspection at approximate 1:30 a.m. on October 13, 2019, Bruce found that the barbed wire was in place and there were no holes in the fence. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 39: 18 – 23); Bruce Aff. ¶ 15.

33. During his inspection at approximate 1:30 a.m. on October 13, 2019, Bruce also confirmed the electric wire was in place, the lights were still flashing, and he used a voltage tester to ensure there it had the proper voltage running through it. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 41: 15 – 23); Bruce Aff. ¶ 15.

34. During his inspection at approximate 1:30 a.m. on October 13, 2019, Bruce also confirmed that all of the gates were closed. Bruce Aff. ¶ 15.

35. During his inspection at approximate 1:30 a.m. on October 13, 2019, Bruce observed no issues with the fencing or any areas where the cow could have escaped. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 39: 8 – 23); Bruce Aff. ¶ 15.

36. At approximately 6:00 a.m. on October 13, 2019, Bruce went back to the Pasture to check the fences again in the daylight. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 39: 24 – 40: 2); Bruce Aff. ¶ 16.

37. During his inspection at approximately 6:00 a.m. on October 13, 2019, Bruce found no areas where the fence was down, he saw no areas of the fence with hair in the barbed wire, and no gates were open. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 40: 1 – 9); Bruce Aff. ¶ 16.

38. During his inspection at approximately 6:00 a.m. on October 13, 2019, there were no signs of how the cow escaped, and all other cattle were accounted for. Bruce Aff. ¶ 16.

39. Defendants did not allow the cow that was struck to be outside of the Pasture on the night of the accident. Bruce Aff. ¶ 17; Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 36: 20 – 22); Redd Aff. ¶ 6, Ex. 5 (Leo Depo. at 34: 18 – 24).

40. Defendants did not have any knowledge that the cow had escaped prior to being contacted by the Deputy Sheriff. Bruce Aff. ¶ 17; Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 36: 11 – 13); Redd Aff. ¶ 6, Ex. 5 (Leo Depo. at 35: 5 – 8); Redd Aff. ¶ 7, Ex. 6 (Joanne Depo. at 14: 11 – 16).

41. Prior to this incident, the only other time a cow escaped from the perimeter fencing of the Pasture and was struck by a vehicle on Highway 11 was in 2010. Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 42: 4 - 13); Bruce Aff. ¶ 18.

42. In 2010, when the cow was struck on Highway 11, Bruce was using 5-strand barbed wire and electric fence twine that was connected to the fence posts. Bruce Aff. ¶ 18. During the same period that the cow escaped, in 2010, Bruce had observed mountain lions in the area, and mountain lions had killed several calves. The cow that escaped onto the highway had claw marks on its back. Bruce Aff. ¶ 18.; Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 42: 4 – 43: 13). It was suspected that the cow that escaped in 2010 was spooked by a mountain lion, which caused it escape. Bruce Aff. ¶ 18; Redd Aff. ¶ 2, Ex. 1 (Bruce Depo. at 42: 4 – 43: 13).

43. After the incident in 2010, Bruce upgraded the electric twine to high tensile electric wire that was set back from the barbed wire fence. Bruce Aff. ¶ 18.

44. After upgrading the electric fence, until the accident at issue and since the accident at issue, Bruce had not had any cattle escape the Pasture and end up on Highway 11.

Bruce Aff. ¶ 18.

45. The veterinarian that Plaintiff disclosed as an “expert” on liability, Daniel Little, DVM, did not inspect the fencing in October 2019. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 48: 1 – 49: 10; 50: 18 - 23).

46. Dr. Little did not inspect the fencing around the Pasture along Highway 11 in October 2019. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 50: 18 – 23; 76: 15 – 17).

47. Dr. Little has not been provided any photographs or videos that showed the fence around the Pasture in October 2019. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 50: 24 – 51: 1).

48. Dr. Little does not know the condition of the fence around the Pasture in October 2019. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 76: 15 – 17; 77: 1 – 13).

49. Dr. Little does not know when the cow escaped, how the cow escaped, or how long before the accident the cow escaped its enclosure. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 76: 15 – 17; 77: 1 – 13; 92: 24 – 93: 13).

50. A 5-strand barbed wire fence, alone, is appropriate to restrain the cattle along Highway 11. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 53: 3 – 15; 54: 15 – 19).

51. Dr. Little performed two unannounced inspections of the Defendants’ property in 2023, one in April, when no cattle were present, and one in June, when cattle were in the pasture. He observed the condition of the maintenance of the fence when the cattle were in the pasture to be adequate. Redd Aff. ¶ 5, Ex. 4 (Little Depo. at 107: 4 – 7).

52. Bruce did not receive a citation after the accident. Bruce Aff. ¶ 19; Redd Aff. ¶ 8, Ex. 7 (Accident Report).

53. The cow was never declared to be running at large. Bruce Aff. ¶ 19.

Dated this 16th day of February, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of February, 2024, a true and correct copy of the foregoing **Defendants' Statement of Undisputed Material Facts** was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such service to:

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STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

<p>AMBER FRERK, Plaintiff, vs. BRUCE HEGGEN, LEO D. HEGGEN, AND JOANNE B. HEGGEN, Defendants.</p>	<p>49CIV22-002356 PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS</p>
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Plaintiff, Amber Frerk, by and through their counsel of record and pursuant to SDCL 15-6-56, submit the following Response to Defendants' Statement of Undisputed Material Facts in support of their Motion for Summary Judgment and her Statement of Additional Material Facts in support of her Opposition to the Motion for Summary Judgment.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF
MATERIAL FACTS**

D1. Admit.

D2. Admit that both Plaintiff and Ms. Sundstrom testified that they saw no cattle out of the enclosure on their way to the concert. Deny that the evidence cited supports the contention that neither Plaintiff nor Ms. Sundstrom noticed issues with the fencing on the way to the concert. *See e.g., Ex. 9¹*, Frerk Depo. at 17:11-13 (Plaintiff did not notice cattle in the field); 127:18-21 (Plaintiff did not notice cattle out on the way to the concert); **Ex. 10**, Sundstrom Depo. at 26:5-17 (Ms.

¹ Plaintiff's first submission is marked as Exhibit 9, which is continued from the exhibits marked in Defendants' submission. This was done intentionally so as to not replicate exhibit numbers.

Sundstrom did not see cattle on the road or in the ditch in the area where the accident ultimately occurred).

D3. Admit.

D4. Admit.

D5. Admit.

D6. Deny. Defendants improperly frame Plaintiff's alleged theory of the case as a "fact" which is not appropriate for summary judgment. To the extent that the Court considers this as a fact, Plaintiff denies. The collision was caused by a cow in the roadway that should have been properly confined by Defendants. **Ex. 9**, 33:23-34:5. Defendants should have reasonably anticipated the danger of a loose cow on the roadway. **Ex. 11**, ¶¶ 9, 32. Defendants failed to properly maintain fencing to ensure that their cattle would not escape onto the busy roadway and that this failure led to a cow under their ownership and control to escape. *Id.* ¶ 30; **Ex. 12**, 51:17-52:11; 76:19-77:13. As cattle owners, Defendants should understand that a vehicle collision with a cow is potentially fatal to the occupants of a vehicle and that they are responsible for confining cattle within the boundaries of their property to protect people traveling on Highway 11. **Ex. 11**, ¶ 10. It is the cattle and landowners' responsibility to confine cattle within the boundaries of their property, and the specific pasture location requires diligent fence monitoring to restrict cattle from Highway 11. *Id.* at ¶¶ 3, 8. Gaps between fenceposts must be narrow enough to restrict the cattle's movement. *Id.* at ¶ 15. Defendants also should have been on notice of an increased risk due to recent heavy rains and flooding that can threaten the structural integrity of fencing. **Ex. 12**, 111:15-20; **Ex. 11**, ¶ 31.

D7. Admit that Ms. Sundstrom testified that she did not see any gates open on the night of October 12 after the accident. Admit that Plaintiff has no personal knowledge of whether any

gates were open on October 12, 2019. Deny the evidence cited supports that Plaintiff did not see any issues with the fencing on the night of the collision. *See Ex. 9*, 126:19-23 (Plaintiff was not paying attending to the fencing and it was dark). Deny that the evidence cited establishes that neither Plaintiff nor Ms. Sundstrom saw any other cattle outside the enclosure on October 12, 2019.

D8. Admit that neither Plaintiff nor Ms. Sundstrom have personal knowledge of how the cow escaped. Deny that Plaintiff has no evidence of how the cow escaped. *See Ex. 12*, 62: 8-63:20 (expert listing ways the cow could have escaped based on his investigation and review); *see also Ex. 11*, ¶¶ 38-41 (showing location and manner the cow escaped from the enclosure).

D9. Admit Plaintiff has no personal knowledge of where the cow was enclosed before the collision. Deny that Plaintiff has no evidence of where the cow escaped from. *See Ex. 13*, B. Heggen Depo. at 39: 10-14; *Ex. 14*, Depo. Ex. 1 (describing and labeling pasture identified as #1 in deposition as the area where the cattle were located in 2019).

D10. Admit that Plaintiff has no personal knowledge of where the cow escaped from its enclosure. Deny that Plaintiff has no evidence of where the cow escaped from its enclosure. *See Ex. 11*, ¶ 37 (“The cow breached the fence southwest of the south end of the bridge on SD 11”); *Ex. 12*, 77: 9-23 (describing where a condition more likely than not existed that would allow the cow to breach the fence).

D11. Admit Plaintiff has no personal knowledge of whether any gates in the area were open or closed.

D12. Admit Plaintiff has no personal knowledge of the time of day the cow escaped or how long it was out before the collision. Deny that Plaintiff has no evidence of when the cow likely escaped. *See Ex. 12*, 92: 24-93: 3 (opining that the cow most likely escaped the evening of October

12, 2019); *see also* B. Heggen Aff. ¶ 14 (stating that before nightfall on October 12, 2019, he checked that all cows were enclosed, meaning that the cow must have escaped after nightfall).

D13. Admit that Plaintiff has no personal knowledge of any other instances of cattle escaping from Defendants' property. Deny that Plaintiff has no evidence of other instances where cattle escaped from Defendants' property. *See* **Ex. 11**, ¶ 42; **Ex. 13**, 42:4-13 (describing instance where a cow escaped his property and was hit by a car); **Ex. 15**, J. Heggen Depo. at 15:22-25 (conceding that one or two cattle escaped onto Highway 11 from property).

D14. Deny. When driving by the scene of the crash on October 13, 2019, Plaintiff did not stop. **Ex. 9**, 27: 11-15. Plaintiff did not look at the fence line while driving by. *Id.* at 28: 6-9. Defendants had fencing integrity issues two days after the collision that resulted in cattle outside of the enclosure. **Ex. 16**, Heggen 213 (11/14/2019 entry); **Ex. 17**, Defendants' Response to Interrogatory No. 5 (served 1/22/2024).

D15. Deny. The evidence cited does not support that the 18-year period as stated by Defendants. **Ex. 9**, 29: 21-23 (testifying to 10-year period).

D16. Admit that the cow was located in a pasture located adjacent to Highway 11 and across the street from Bruce Heggen's home. Deny that the cow was enclosed. *See* **Ex. 18**, Depo. Ex. 3 (photo of cow after collision on the Highway).

D17. Admit that the pasture is enclosed with 5-strand barbed wire fence and a high tensile wire. Deny that the high tensile wire was set back 18". **Ex. 11**, ¶12 (offset is only "inches").

D18. Deny. The fact that the lights are flashing alone is not dispositive of the electric fence's function. If the electric tensife wire was at an incorrect height, the lights would still flash despite the fence being ineffective. *See* **Ex. 12**, 75: 1-17 (explaining that monitoring by lights alone

is an inadequate inspection of the high tensile wire); *see also* **Ex. 11**, ¶¶ 34, 35 (“A reasonable cattle owner would know that the fact that the lights are working to indicate pulsating electrical voltage, does not indicate a safe fence.”); *Id.* ¶¶ 20, 21 (explaining the height high tensile wire should be to effectively confine cattle).

D19. Admit that in 2019, Defendant Bruce Heggen moved the cattle, into the Pasture for the first time on May 30. Deny that the cattle remained in the pasture until June 16. *See* B. Heggen Aff. ¶ 12. The evidence cited supports that the cattle remained in the Pasture until June 28, not June 16. Admit that cattle would have returned to the pasture on approximately July 31, 2019 and remained there until October 14.

D20. Deny. Defendants did not adequately maintain the fences to prevent the likelihood of an animal walking under the high tensile wire and through loose, sagging, or broken barbed wire fence. *See* **Ex. 11**, ¶¶ 29, 33, 38. Defendants’ fence was in a state of disrepair after the collision that would not have occurred even within a year or two years. **Ex. 12**, 76: 19-77:1; 79:14-22. The state of disrepair that the fence was in in 2023 is indicative of longstanding lack of maintenance. *Id.* 2019 was a wet year during which the river on Defendants’ property flooded often. **Ex. 13**, 25:22-24; 26: 2-5.

D21. Admit that before rotating the cattle into the Pasture, Defendant Bruce Heggen checked the electric fence to ensure it was electrified. Deny that checking if the fence is electrified is adequate to determine that the fence “worked” because the height of the tensile wire was not checked. *See* **Ex. 12**, 75:1-17 (explaining that monitoring by lights alone is an inadequate inspection of the high tensile wire); *see also* **Ex. 11**, ¶¶ 34, 35.

D22. Deny. The state of disrepair that the fence was in in 2023 indicates longstanding inadequate maintenance. **Ex. 12**, 79:14-22. The cow escaped from an area where the barbed wire

fence was in disrepair. **Ex. 11**, ¶ 38. Defendants did not adequately maintain the fences to prevent the likelihood of an animal walking under the high tensile wire and through loose, sagging, or broken barbed wire fence. *Id.* ¶ 33. Defendants did not act reasonably in maintaining the fence. *Id.* ¶ 30.

D23. Deny. Defendants' fence was in a state of disrepair after the collision which would not have occurred even within a year or two years. **Ex. 12**, 76:19-77:1; 79:14-22. The state of disrepair that the fence was in in 2023 is indicative of longstanding lack of maintenance. *Id.* When the high tensile wire is the primary deterrent to cows escaping poorly maintained or broken barbed wire fence, cattle will respect it if appropriately positioned; but Defendants did not check the height of the tensile wire and instead relied upon flashing lights to assume that the fence was working properly. **Ex. 11**, ¶¶ 18, 19, 22, 29, 30, 33. If the electric tensile wire was at an incorrect height, the lights would still flash despite the fence being ineffective. *See Ex. 12*, 75:1-17 (explaining that monitoring by lights alone is an inadequate inspection of the high tensile wire); *see also Ex. 11*, ¶¶ 34, 35.

D24. Deny. The state of disrepair that the fence was in in 2023 indicates longstanding inadequate maintenance. **Ex. 12**, 79:14-22. The cow escaped from an area where the barbed wire fence was in disrepair. **Ex. 11**, ¶ 38.

D25. Admit.

D26. Deny. The weather on October 12, 2019, was a mix of rain and snow. **Ex. 9**, 12:22-24; 18:17-20; **Ex. 19**, Depo. Ex. 7. Earlier in the day on October 12, 2019, it was sleeting in the area. **Ex. 10**, 19:7-15. Defendants use ATVs to evaluate the integrity of fencing, but this is not done during the winter months due to inadequate weather conditions. **Ex. 13**, 39:18-20; **Ex. 20**, L. Heggen Depo. at 25:21-26:1. On October 12, 2019, Defendants failed to adequately inspect the

fence to ensure that the wire was attached to all posts to maintain an effective height above the ground. **Ex. 11**, ¶¶ 29, 33. The cow escaped from an area of which the barbed wire fence was in disrepair and the high tensile wire, while electrified, was too high above the ground to be effective. *Id.* ¶ 38.

D27. Deny. The weather on October 12, 2019, was a mix of rain and snow. **Ex. 9**, 12:22-24; 18:17-20; **Ex. 19**. Earlier in the day on October 12, 2019, it was sleeting in the area. **Ex. 10**, Sundstrom Depo. at 19: 7-15. Defendants use ATVs to evaluate the integrity of fencing, but this is not done during the winter months due to inadequate weather conditions. **Ex. 13**, 39:18-20; **Ex. 20**, 25:21-26:1. On October 12, 2019, Defendants failed to adequately inspect the fence to ensure that the wire was attached to all posts to maintain an effective height above the ground. **Ex. 11**, ¶¶ 29, 33. The cow escaped from an area of which the barbed wire fence was in disrepair and the high tensile wire, while electrified, was too high above the ground to be effective. *Id.* ¶ 38.

D28. Deny. One cow was on Highway 11 the evening of October 12, 2019. **Ex 18**. A gate may have been open. **Ex 13**, 44:10-20; 46: 9-18 (open pasture gates have been discovered by Bruce Heggen and his neighbors at least four times in the last 5-7 years). Deny that the fencing was in place and that the electric fence was operational. The cow escaped from an area of which the barbed wire fence was in disrepair and the high tensile wire, while electrified, was too high above the ground to be effective. **Ex. 11**, ¶ 38. By only checking the electrical status of the high tensile wire, Defendants failed to adequately inspect the fence to ensure that the wire was attached to all posts to maintain an effective height above the ground. *Id.* ¶¶ 29, 33.

D29. Deny the sheriff informed Bruce Heggen “he may have had a cow get hit on the highway.” See **Ex. 13**, 37:4-7; 38:13-19 (vaguely recalling “just that [he] had a cow hit” on the call with the sheriff and nothing further).

D30. Admit.

D31. Deny that Bruce Heggen inspected the fencing that night. The weather on October 12, 2019 included snow. **Ex. 9**, 12:22-24; 18:17-20; **Ex. 1**.; Bruce Heggen doesn't use ATVs in winter conditions. **Ex. 20**, 25: 21-27:7.

D32. Deny that Bruce Heggen inspected the fencing that night. The weather on October 12, 2019 included snow. **Ex. 9**, 12:22-24; 18:17-20; **Ex. 19**. Bruce Heggen doesn't use ATVs in winter conditions. **Ex. 20**, 25: 21-27:7. The cow escaped from an area of which the barbed wire fence was in disrepair. **Ex. 11**, ¶ 38; *see also* **Ex. 18** (showing the deceased cow outside of the enclosed pasture). Defendants' fence was in a state of disrepair during an inspection after the collision that would not have occurred even within a year or two years. **Ex. 12**, 76:19-77:1; 79: 14-22. The state of disrepair that the fence was in in 2023 is indicative of longstanding lack of maintenance. *Id.*

D33. Deny that Bruce Heggen inspected the fencing that night. The weather on October 12, 2019 included snow. **Ex. 9**, 12:22-24; 18:17-20; **Ex. 19**; Bruce Heggen doesn't use ATVs in winter conditions. **Ex. 20**, 25:21-27:7. Deny that the lights flashing and proper voltage was running is adequate to determine effectiveness of electric fence without checking the height of the wire in relation to the animal you are confining. A reasonable cattle owner would know that the fact that the lights are working to indicate pulsating electrical voltage does not indicate a safe fence. **Ex. 11**, ¶¶ 34, 35. Since the high tensile wire is a single strand of wire, it must follow the terrain at a constant elevation to be effective. *Id.* ¶¶ 20, 21. By only checking the electrical status of the high tensile wire, Defendants failed to adequately inspect the fence to ensure that the wire was attached to all posts to maintain an effective height above the ground. *Id.* ¶¶ 29, 33; Little Depo. at 75: 1-17.

D34. Deny that Bruce Heggen inspected the fencing that night. The weather on October 12, 2019 included snow. **Ex. 9**, 12: 22-24; 18:17-20; **Ex. 19**. Bruce Heggen doesn't use ATVs in winter conditions. **Ex. 20**, 25: 21-27:7.

D35. Deny that Bruce Heggen inspected the fencing that night. The weather on October 12, 2019 included snow. **Ex. 9**, 12: 22-24; 18:17-20; **Ex. 19**. Bruce Heggen doesn't use ATVs in winter conditions. **Ex. 20**, 25: 21-27:7. Deny that there were no issues with the fencing or where the cow could have escaped. The cow escaped from an area where the barbed wire fence was in disrepair and the high tensile wire, while electrified, was too high above the ground to be effective. **Ex. 11**, ¶ 38. The cow breached the fence southwest of the south end of the bridge on Highway 11. *Id.* ¶ 37. In 2023, Defendants' fence was in a state of disrepair that would not have occurred even within a year or two years. **Ex. 12**, 76:19-77: 1; 79: 14-22. The state of disrepair that the fence was in in 2023 is indicative of longstanding lack of maintenance. *Id.*

D36. Deny this inspect occurred during daylight. The sun didn't rise until 7:38 am on October 13, 2019. **Ex. 8**.

D37. Deny that this early morning "daylight" inspection was possible since the sun didn't rise until 7:38 am on October 13, 2019. **Ex. 8**. Deny that the evidence cited supports the broad contention that there were no areas seen where the fence was "down". The cited evidence shows nothing about the status of the high tensile wire, particularly the height, and if that was checked and found to be adequate. To be effective, high tensile wire should be the approximate height to contact a cow on its neck to prevent it from breaching a fence. **Ex. 11**, ¶¶ 21, 22.

D38. Deny that this early morning "daylight" inspection was possible since the sun didn't rise until 7:38 am on October 13, 2019. **Ex. 8**. The cow breached the fence southwest of the south

end of the bridge on Highway 11, in an area where the barbed wire fence was in disrepair and the high tensile wire was too high above the ground to be effective. **Ex. 11**, ¶¶ 37, 38.

D39. Deny. *See* evidence cited in D6, *supra*.

D40. Admit.

D41. Deny. There have been one or two other incidents where a cow escaped onto Highway 11 from Defendants' property. **Ex. 15**, 15: 22-25.

D42. Admit that when a cow escaped Defendants' property and was struck on Highway 11, Defendant Bruce Heggen was using 5-strand barbed wire and electric fence twine that was connected to the fence posts. Deny that the cow that escaped in 2010 was spooked by a mountain lion and the that marks on the cow's back were "claw marks". It is more likely than not that the scratches on the back of this cow that previously escaped were the result of the cow being scratched by an inadequate strand of barbed wire as she crossed under the high tensile wire and through the barbed wire fence. **Ex. 11**, ¶¶ 43-44. The idea of a cow being chased by a mountain lion on a farm in South Dakota is highly improbable. **Ex. 12**, 63: 5-16.

D43. Admit.

D44. Deny. There have been one or two other incidents where a cow escaped onto Highway 11 from Defendants' property. **Ex. 15**, 15: 22-25. On May 5, 2019, a calf was discovered under a fence. **Ex. 16**; **Ex. 17**, Defendants' Response to Interrogatory No. 4 (1/22/2024). On October 14, 2019, two cows got out of their enclosure and onto neighboring property and neighboring cattle to come onto the Heggens' property. **Ex. 16**, Heggen 213; **Ex. 17**, Defendants' Response to Interrogatory No. 5 (1/22/2024).

D45. Deny the insinuation that Dr. Little is not an expert based upon the use of quotation marks. *See Ex. 11* at Attachment A. Admit otherwise.

D46. Admit.

D47. Admit.

D48. Deny that Dr. Little has no evidence of the condition of the fence around the Pasture in 2019. The fence around the Pasture was in a state of gross disrepair during Dr. Little's inspection of the fencing after the collision. **Ex. 12**, 76:19-77:1; 79:14-22. This is indicative of a longstanding lack of maintenance. *Id.* at 79:14-22. The September 2019 weather conditions contributed to the fence integrity issues. **Ex. 11**, ¶¶ 16, 29.

D49. Admit that Dr. Little has no personal knowledge of when the cow escaped, how the cow escaped, or how long before the accident the cow escaped. Deny that Dr. Little does not have evidence as to when and how the cow escaped. *See Ex. 12*, 92:24-93:3 (opining that the cow likely escaped the evening of October 12, 2019); *Id.* at 62:8-63: 20 (providing list of ways this cow may have escaped); *see also Ex. 11*, ¶¶ 4, 17, 23, 24 (pasture where the primarily Black Angus cattle were kept on the day of the collision extended on both side of Split Rock Creek and is on either side of Highway 11, and cattle travelled under the highway bridge to graze) and ¶ 38 (opining that the cow escaped from an area of which the barbed wire fence was in disrepair and the high tensile wire was too high above the ground to be effective) and ¶¶ 4. The September 2019 weather conditions contributed to the fence integrity issues. **Ex. 11**, ¶¶ 16, 29.

D50. Deny. A 5-strand barbed wire fence alone is appropriate to restrain cattle *only* if the fence is well-maintained. **Ex. 12**, 53:3-8; 54:15-17 (emphasis added). Deny that Defendants' five-strand barbed wire fence alone was appropriate to restrain the cattle along Highway 11. Highway 11 is a busy road with heavy car and trailer traffic. **Ex. 13**, 34:1-11; **Ex. 11**, ¶¶ 6, 7. The five-strand fence material observed on Defendants' property was not sufficient to restrain cattle.

Ex. 12, 53: 17-23. Due to the degradation of the fence material, had it not been for the high-tensile wire, the five-strand fence alone would not keep cattle enclosed. *Id.* at 52:3-11.

D51. Admit that when Dr. Little visited Defendants' property in June 2023, cows were in the field and the condition of the fence was adequate. Deny that there were no cattle in the pasture in April. Dr. Little testified that he does not recall seeing cattle in the pasture at that time and that he himself saw none. **Ex. 12**, 52:12-23; 53:1-2. While Dr. Little observed the condition of the maintenance of the fence in June of 2023 to be adequate, when he visited in April of 2023, the fence was in a state of disrepair, rendering it inadequate to contain animals to the Pasture. *Id.* at 51:14-52:11. The fence that Dr. Little observed during his first inspection had broken and loose strands and gaping holes. *Id.* at 52:7-11.

D52. Admit.

D53. Deny. The evidence cited does not support the fact stated. In his affidavit, Defendant Bruce Heggen stated, "...nor have I been *made aware* that the cow Plaintiff struck was declared to be running at large." B. Heggen Aff. ¶ 19. The cow on the roadway was not accompanied by Bruce Heggen or anyone else when it was struck. **Ex. 13**, 37:5-10. The cow that Plaintiff collided with was a domestic animal in the roadway. *See Ex. 7* at 3 (classifying the animal hit as domestic and road contributing circumstance as 'Animal in roadway').

PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS

P1. The cow Plaintiff collided with escaped from closed range pastureland owned by Leo and Joanne Heggen. B. Heggen Aff. ¶ 3; *see Ex. 15*, 8:9-14 (stating that her and her husband own pasture and crop ground); **Ex. 11**, ¶¶ 2, 11.

P2. The weather in Sioux Falls, South Dakota on October 12, 2019, was a mix of rain and snow; road conditions were wet. **Ex. 9**, 12: 22-24; 18: 19-20; 63: 7-9; **Ex. 19**.

P3. 2019 was a wet year in general in the Sioux Falls area. **Ex. 13**, 25: 22-24.

P4. There is a river that runs through Defendants' property. *Id.* at 26: 10-24; **Ex. 21**.

P5. Rising water levels are known to push cattle closer to the fence on Defendants' property. *Id.* at 24: 6-8.

P6. When the water level in the river on Defendants' property would rise and then subsequently retreat, it was necessary to repair impacted fences. **Ex. 13**, 26:7-9. But there are no records of when these repairs were made. *Id.* at 54:18-20.

P7. In 2019, the river on Defendants' property flooded often. **Ex. 13**, 26:2-5; *see also Ex. 22*, Heggen 203-206.

P8. In 2019, large sections of fencing on Defendants' property were replaced due to flooding. **Ex. 13**, 32:18-19; **Ex. 21** (dotted lines indicated replaced areas).

P9. In 2019, the water level in the river on Defendants' property was so high that water got into the fence around the bridge where the collision with Defendants' cow ultimately occurred. **Ex. 13**, 27:6-10.

P10. It is highly unlikely that a large, older cow, on an uphill & wet grade would attempt jumping a fence or would be successful in doing so. **Ex. 12**, 64:6-15; **Ex. 11**, ¶¶ 26, 36.

P11. It is highly unlikely that an Angus cow the size of the one Plaintiff collided with could jump a fence. **Ex. 12**, 66:15-16; **Ex. 11**, ¶¶ 26, 36.

P12. At the time the collision with Defendants' cow occurred on October 12, 2019, it was very dark outside. **Ex. 10**, Sundstrom Depo. at 19:17; **Ex. 7**; **Ex. 15**, 14:4-10.

P13. Highway 11, the roadway where Plaintiff collided with Defendants' cow, is a busy road with consistent car and semi-trailer traffic. **Ex. 13**, 34: 1-11; **Ex. 11**, ¶¶ 6-7; **Ex. 23**, Highway data.

P14. Highway 11 is one of the busiest roads in eastern South Dakota. **Ex. 11**, ¶¶ 6-7; **Ex. 23**.

P15. Highway 11 is not well lit: there are no lights along the road in the area where Defendants' property is located. **Ex. 13**, 34: 19-22; **Ex. 15**, 13:21-22; **Ex. 20**, 33:10-15.

P16. There are no cattle guards on Highway 11 in the area of Defendants' property. **Ex. 13**, 36:6-10; **Ex. 15**, 13:1-3; **Ex. 20**, 33:24-34:3.

P17. There are no signs warning motorists of potential cattle in the roadway on the stretch of Highway 11 through Defendants' property. **Ex. 13**, 35:14-19.

P18. Highway 11 is paved with black asphalt. *Id.* at 34:17-18; **Ex. 20**, 32:25-33:1; **Ex. 15**, 13:19-20.

P19. Defendants' cow that Plaintiff collided with was black. **Ex. 18**, Depo. Ex. 3.

P20. There have been several incidents where gates on Defendants' property have been left standing wide open. **Ex. 13**, 43:14-24. On at least one incident, three cows did escape Defendants' pasture when the gates were left open. *Id.* at 44:1-5.

P21. On occasion, someone else's cattle would come onto Defendants' property. **Ex. 20**, 41: 2-6. These other cattle would gain entry to Defendants' property when a hot wire was shorted, or a fence post was knocked down. *Id.* at 41:9-17.

P22. Defendant Bruce Heggen rents an adjoining pasture from a third-party. *Id.* at 41:9-17.

P23. There is a railroad bridge on this pasture. *Id.* at 41:18-21.

P24. Instead of fencing across the river, Defendants elected to allow the cattle to move under the railroad bridge. *Id.* at 42:2-16.

P25. In 2019, there was no fence or hot wire underneath Highway 11 on Defendants' property. *Id.* at 42:17-22.

P26. In 2019, Defendants allowed people to fish on their property. *Id.* at 19:16-21; 15:8-15; 16:4-9.

P27. In 2019, Defendants also had knowledge that people were entering their property to fish without permission. *Id.* at 19:20-21; 15:8-15. Fisherman had cut fences and canoers had cut electric fence to access the river in the past. **Ex. 13**, 47:11-19.

P28. These people gained access to Defendants' property through gates. **Ex. 20**, 18:18-19.

P29. People were able to gain entry to Defendants' property through these gates without any special fencing supplies or other equipment. *Id.* at 19:22-20:3.

P30. Fencing on Defendants' property is not checked during the winter months from November until May. *B. Heggen Aff.* ¶ 9.

P31. Over the winter months, the fencing around the Pasture can become in disrepair. *Id.*

P32. Black Angus cows are more likely to go through a fence than to jump over it. **Ex. 12**, 57:3-5.

P33. The cow that was killed in the collision was a Black Angus. **Ex. 11**, ¶25.

P34. The Pasture has a rolling topography. **Ex. 11**, ¶13.

P35. Both the barbed wire fencing and the high tensile wire are intended to follow the topography of the Pasture to effectively confine the cattle. **Ex. 11**, ¶14.

P36. Since the high tensile wire is a single strand of wire, it must follow the terrain at a relatively constant elevation to be effective. **Ex. 11**, ¶ 20.

P37. To be effective in confining Black Angus cattle, a single strand electric fence, or high tensile wire, should be approximately the height of the animal's neck while grazing. **Ex. 12**, 57:5-9.

P38. If an electric fence wire is too tall and hit a cow at a height past its shoulders, the cow would more than likely bolt forward and breach the fence. *Id.* at 58: 3-9.

P39. The topographical change in the area where the collision occurred caused the electrical wire in that area to be too high off the ground. *Id.* at 75: 11-17.

P40. Electrical wire that was set too high off the ground to be effective would still function appropriately when tested with a voltage tester. *Id.*

P41. Lights will still appear illuminated on an electrical fence when the wire is set too high off the ground to be effective. *Id.*

P42. Defendants failed to adequately inspect the high tensile wire to ensure that it was at an effective height. **Ex. 11**, ¶ 34.

P43. The five-strand barbed wire fence on the west side of Highway 11 on Defendants' property was in grave disrepair during inspection after the collision. **Ex. 12**, 51:17-23.

P44. The fence had loose and broken strands and gaping holes. *Id.* at 52: 7-9.

P45. This five-strand barbed wire fence would be unable to confine animals effectively to the Pasture. *Id.* at 51:23-52:11.

P46. The state of disrepair that the fence was in in 2023 would not happen quickly. *Id.* at 49:14-20.

P47. The condition of the fence in 2023 raises concerns about maintenance of the fencing on Defendants' property. *Id.*

P48. The fence lines on Defendants' property are evaluated using ATVs. **Ex. 13**, 39:18-20.

P49. Defendants do not use their ATVs in the winter months due to weather conditions. **Ex. 20**, 25:21-26:1.

P50. A loose cow on the road would risk injury to motorists driving on the highway. **Ex. 13**, 36:20-37:2; **Ex. 20**, 4:18-35:4.

P51. Cows were found outside their enclosures multiple times in 2019. **Ex. 16**, Heggen 213 (5/5/19 and 11/14/2019 entries); **Ex. 17**, Defendants' Response to Interrogatory Nos. 4-5 (served 1/22/2024).

P52. The cattle were removed from the pasture weeks earlier than usual after Bruce Heggen discovered more of his cattle escaped their pasture just two days after the Highway 11 collision. **B. Heggen Aff.** ¶¶ 7, 12; **Ex. 16**, Heggen 213 (11/14/2019 entry); **Ex. 17**, Defendants' Response to Interrogatory No. 5 (served 1/22/2024).

P53. The section of Highway 11 that intersects the land owned by Leo and Joanne Heggen is heavily trafficked. **Ex. 11**, ¶2; **Ex. 23**.

P54. Split Rock Creek experienced historic high water levels in mid-September 2019, which resulted a flood stage and persistent above average gage height for over a month after peak levels. **Ex. 24**, USGS data. The September 2019 weather conditions contributed to the fence integrity issues. **Ex. 11**, ¶¶ 16, 29. Defendants also should have been on notice of an increased risk due to recent heavy rains and flooding that can threaten the structural integrity of fencing. **Ex. 12**, 111:15-20; **Ex. 11**, ¶ 31.

P55. Most of the pasture was underwater towards the end of September 2019. **Ex. 13**, 27:11-24.

P56. Cattle escaped from Defendants' property before, and even resulted in a collision with a motorist on Highway 11. *See* **Ex. 11**, ¶ 42; **Ex. 13**, 42:4-13 (describing instance where a cow escaped his property and was hit by a car); **Ex. 15**, 15:22-25 (conceding that one or two cattle escaped onto Highway 11 from property).

P57. The cow breached the fence southwest of the south end of the bridge on Highway 11 before ending up on the roadway, in an area where the barbed wire fence was in disrepair and the high tensile wire was too high above the ground to be effective. **Ex. 11, ¶¶ 37-39**

P58. Minnehaha County Ordinance MC52-17 was enacted to protect the public health, safety, and welfare of residents in Minnehaha County. **Ex. 25, MC 52-17.**

P59. Amber Frerk resides at 24550 486th Avenue – a part of unincorporated Minnehaha County. **Ex. 9, 6:6-7.**

P60. Minnehaha County Ordinance MC 46-14 addresses the obstruction of highway right-of-ways. **Ex. 26, MC 46.14.**

P61. The Minnehaha County Highway Department Snow and Ice Removal Policy shows its interplay with MC 46.14 and establishes its safety focus. **Ex. 27.**

P62. Amber Frerk suffered injuries as a result of the collision with the cow on the roadway. **Ex. 9, 36: 9-15.**

P63. Defendant Bruce Heggen provided fencing photographs and a statement, among other things, to his insurance company before the lawsuit was filed. **Ex. 28.**

Respectfully submitted this 18th day of March, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of March, 2024, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF ADDITIONAL UNDISPUTED MATERIAL FACTS** was served via the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such service to:

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COPY

STATE OF SOUTH DAKOTA)
COUNTY OF MINNEHAHA)

:SS

CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

AMBER FRERK,

49CIV.22-002356

Plaintiff,

MOTIONS HEARING

-vs-

BRUCE HEGGEN, LEO D. HEGGEN, AND
JOANNE B. HEGGEN,

Defendants.

BEFORE: The Honorable Douglas P. Barnett
 Circuit Court Judge
 Sioux Falls, South Dakota.
 March 26, 2024

APPEARANCES: Ms. Kylie Schmidt
 Mr. John C. Quaintance - via zoom
 Mr. Steve Shapiro - via zoom
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1 THE COURT: Good morning, everyone. We're on the record
2 in the matter of Amber Frerk, plaintiff, versus Bruce Heggen,
3 Leo Dean Heggen, and Joanne B. Heggen. This is CIV. file 22-
4 2356. My name is Judge Douglas Barnett. As you all are
5 aware, I'm the judicial officer assigned to handle this file.
6 We did have a previous hearing back in, I believe it was
7 March of 2023 relative to a discovery issue.

8 I would note that personally present in the courtroom,
9 ah, counsel for one of the, and I believe there's three
10 attorneys who have noticed, ah, noticed appearances in this
11 case for plaintiff. The one in the courtroom is Ms. Kylie
12 Schmidt. Also counsel for plaintiff, Mr. Steve Shapiro and
13 Mr. John Quaintance appear via Zoom. I would note that the
14 plaintiff, herself, Ms. Frerk, is also appearing via Zoom.

15 The defendants are represented by Mr. Ryan Redd, ah,
16 and, obviously, he's personally present in the courtroom.

17 It's the time and place set for hearing as to
18 defendants' motion for summary judgment. Ah, initially, the
19 court would just note for the record it's reviewed the entire
20 file, but specifically the documents relative to this motion,
21 namely, the defendants' motion. Ah, the defendants' brief.
22 The defendants' statement of material facts. Mr. Redd's
23 initial affidavit, ah, with several exhibits. His, what I
24 would refer to as his initial affidavit relative to
25 defendants' motion with the corresponding exhibits. There's

1 also an affidavit from one of the defendants, Mr. Bruce
2 Heggen, and that was the extent of the plain -- or, excuse
3 me, the defendant's initial filings relative to this motion.

4 I have reviewed the plaintiff's response to the
5 plaintiff's statement, ah, or the plaintiff's response to
6 defendant's statement of facts, and then the plaintiff's
7 statements or statement of additional material facts, as well
8 as the defendant's brief in opposition or, excuse me, as well
9 as the plaintiff's brief in opposition to defendants' motion
10 for summary judgment.

11 And if I misspoke, ah, earlier, I'm referring to as to
12 the statement of material facts, the plaintiff's response as
13 well as the plaintiff's statement.

14 There is also an affidavit provided by Ms. Schmidt with
15 several exhibits. I believe it was 8 through 23, if I recall
16 correctly, ah, that the court has reviewed.

17 In addition, Mr. Redd filed a reply brief on behalf of
18 defendants, and then what I would refer to as Mr. Redd's
19 second affidavit relative to defendants' motion.

20 Mr. Redd, I'll start with you. Does that adequately
21 summarize the filings relative to what we're here to decide
22 today?

23 MR. REDD: Yes, Your Honor.

24 THE COURT: Same question for you, Ms. Schmidt.

25 MS. SCHMIDT: Yes, except plaintiff has 20 exhibits, ah,

1 9 through 28.

2 THE COURT: 9 through 28.

3 MS. SCHMIDT: Attached, but with that correction, what
4 the court summarized was accurate.

5 THE COURT: You are correct, and that was off the top of
6 my head, and I appreciate the correction, counsel.

7 Mr. Redd, your motion, you may proceed when you're ready
8 with your argument, Sir.

9 MR. REDD: Would you like for me to stand?

10 THE COURT: However you're comfortable. You, you can
11 stand, sit. You can, you can sit initially and then stand
12 later. I'm not, I'm not too much of a stickler on that,
13 counsel.

14 MR. REDD: Thank you.

15 THE COURT: I mean, and here I'm interrupting you
16 already, but I mean essentially, and I, I guess I direct this
17 to both parties. I mean isn't the big question here relative
18 to the case law that you both have cited, and this court's
19 understanding of the status of the law relevant or relative
20 to these types of proceedings that I'd refer to as cow cases.
21 I mean isn't it whether the defendants should have reasonably
22 anticipated that that Angus would stray onto Highway 11 on
23 the late evening hours of October 12th, 2019? Does that sum
24 up the big question here?

25 MR. REDD: Yes, Your Honor.

1 THE COURT: Okay. Proceed.

2 MR. REDD: And it does. Um, it's cow versus car case.
3 At its heart it's a negligence action though. Um, and its
4 negligence action, plaintiff has the burden to show that the
5 defendants were negligent. They breached their duty, um,
6 which caused her harm.

7 THE COURT: You agree there is a duty here?

8 MR. REDD: Well, there's a duty.

9 THE COURT: Yep.

10 MR. REDD: As a landowner or possessor has a duty to,
11 um, take reasonable steps to ensure their cattle remain
12 confined, um, and the records reflect in this case
13 undisputedly that those steps were taken. Um, and
14 plaintiff's case, as she testified, she says the defendants
15 are liable simply because it was their cow. It should have
16 stayed in the confines of the highway [sic]. Um, that's her
17 testimony on Exhibit 2, 34 one through five, but the law
18 recognizes that cattle can get out without negligence of the
19 possessor of land or the owner of the cattle. The law
20 requires evidence. And I cited a number of case laws, um, in
21 various jurisdictions across the country that have held the
22 same thing, and the fact that just cause a cow gets out
23 doesn't mean the defendant was negligent or did something
24 wrong, that can happen. Cattle are sentient beings. Um,
25 they may be domesticated, but they're still -- have a mind of

1 their own. Um, and at the end of the day here, the
2 plaintiffs have presented no evidence as to how this cow
3 escaped. They haven't presented evidence that the defendants
4 were negligent and did something wrong, or failed to do
5 something that they should have done to prevent this cow from
6 escaping. Um, instead they speculate how the cow escaped and
7 they claim, well, it must have been because the fence was in
8 poor condition. Um, but despite all the submissions,
9 plaintiffs present no evidence that the fence was in poor
10 condition.

11 THE COURT: I did have a question with, about that, and
12 I understand the inspection of April of 2023, and then I
13 believe their expert went out again in June of 2023.

14 MR. REDD: Yep.

15 THE COURT: But let me back you up a little bit to 2019
16 in the spring. We all know that there was flooding.

17 MR. REDD: Sure.

18 THE COURT: All over, um, that spring. And there is I
19 noticed some evidence in the record that your client's
20 pasture area the -- I'll just refer to it as the pasture area
21 in question.

22 MR. REDD: Yep.

23 THE COURT: And as I understand it, and I just want to
24 make sure that that I'm, that I'm understanding this clear.
25 Ah, there's, for lack of a better term an overpass over your

1 client's pasture. A bridge, if you will, on Highway 11,
2 which runs north/south Minnehaha County, and it's basically
3 the main artery from I-90 up to the Garretson area. Um, your
4 client's pasture borders the east and the west of Highway 11,
5 and those cattle would be able to or when he's pasturing his
6 cattle there they could move freely along, I believe it's
7 Split Rock Creek, ah, along the creek side, ah, or maybe it
8 wasn't Split Rock Creek. Split Rock Creek, but it's a creek,
9 but they could move alongside underneath the bridge of
10 Highway 11 to the different, the east and west, what I'll
11 refer to as the east and west sides of the pasture. Am I,
12 I'm tracking that all correctly, right?

13 MR. REDD: Yeah, that's right. Highway 11 runs, for
14 simplicity, right through the middle of the pasture, and the
15 cattle can go under the bridge.

16 THE COURT: And where this happened was just north of
17 285th?

18 MR. REDD: Correct.

19 THE COURT: Yeah.

20 MR. REDD: And it was on that bridge that the cattle --

21 THE COURT: -- on the bridge where the cattle can go
22 under?

23 MR. REDD: -- can go under.

24 THE COURT: Now, there's evidence in the record that I
25 noticed that there, that your client sustained some flooding

1 in the spring of 2019. One thing I noticed that the
2 plaintiff noted in their briefing or drew the court's
3 attention to, was and your position is, is that those fences
4 on or about October 12th were in, ah, in adequate shape, and
5 as I understand how this is set up, it's five strand barbed
6 wire, which your client also had an electric fencing system,
7 approximately, 18 inches behind the five strand barbed wire.
8 Now, and that was updated in 2010 after the one critter got
9 out that could have been you think mauled by a mountain lion.
10 So, my question to you is, do you have any records that show
11 any of the, well, there's alleged issues from the flooding,
12 instability of the fencing. Are there any records showing
13 any repairs that your client made?

14 MR. REDD: The, there's no --

15 THE COURT: -- like documents. Any materials?

16 MR. REDD: Right.

17 THE COURT: I know what he testified to in his
18 deposition.

19 MR. REDD: Yeah.

20 THE COURT: I see, I, I, I'm guessing you're looking at
21 your client's deposition there, but is, is there anything, is
22 there anything that substantiates that testimony?

23 MR. REDD: There's, we don't have any documentation to
24 say he went to Menards and bought X, Y, Z, on this date.

25 THE COURT: Do you understand my question?

1 MR. REDD: I understand your question.

2 THE COURT: Okay.

3 MR. REDD: He has, he buys in bulk. He has fencing
4 materials on site. He has to go --

5 THE COURT: -- carries it around in his fencing side by
6 side it looks like?

7 MR. REDD: Yep.

8 THE COURT: Okay.

9 MR. REDD: So, I don't have documentation that says,
10 hey, on this day I went out, and I replaced this section of
11 fence. There's nothing that says that.

12 THE COURT: There is like, for example, what I noticed,
13 too, there's a log sheet that your client keeps as to his
14 critters.

15 MR. REDD: Um-hum, yes.

16 THE COURT: And he noted there were times where, ah, his
17 livestock got out of, ah, and I, as I understand it, a
18 different area of his land where they had, had gotten out
19 into a neighbor's pasture, what have you. So, he, he does
20 keep a log sheet, if you will, of incidents that occur with
21 his livestock; is that fair to say?

22 MR. REDD: Yes, Your Honor.

23 THE COURT: Is there, there's no such log sheet as to
24 repairs that he makes?

25 MR. REDD: He does not keep a maintenance log, or repair

1 log, um, of that sort. So, there's no documentation to show
2 the repairs that he made throughout the year in 2019.

3 THE COURT: Okay.

4 MR. REDD: To that point, there's no evidence to say
5 those repairs --

6 THE COURT: -- didn't take place, I understand.

7 MR. REDD: But, no, he doesn't have documents for it or
8 to substantiate his testimony, which is that he made repairs
9 even in September of 2019, there was some flooding that was
10 referenced by plaintiffs. In his testimony in his brief or
11 in his deposition is after some of that flooding when it took
12 place they replaced sections of the fencing. Um, there's
13 submissions by the plaintiff of high water marks and stuff,
14 which is not supported by any testimony, but, ah, the water
15 subsided. This is, you know, a month removed from the
16 flooding experience of September. So, there's no evidence or
17 testimony that the water was still causing problems to the
18 fencing or that it was still at a state of flood or a flood
19 stage as of the time of this accident.

20 THE COURT: Well, and it's a crick, water levels are
21 going to go up and down depending on...

22 MR. REDD: Yep.

23 THE COURT: You know, rain, snowpack, etcetera.

24 MR. REDD: Correct.

25 THE COURT: Okay.

1 MR. REDD: So, well, to this, to that point, you know,
2 plaintiffs they haven't presented any evidence as to how this
3 cow got out, they don't know. Um, they speculate that it
4 must have been because of poor shape, but what is not in the
5 record is there's no evidence from the plaintiff, who's lived
6 north of Garretson for 18 years. She drives up and down
7 Highway 11 every day to work, down and back. Um, not once
8 has she stopped and said, hey, I -- here's an affidavit. I
9 drove by and it was in poor shape, cattle were out. The only
10 time she's ever saw a cow out was the day of this accident
11 and the time she hit it.

12 THE COURT: What reasons would she have to look though?
13 And I understand she can't say she ever noticed, but --

14 MR. REDD: -- sure.

15 THE COURT: -- but what I mean she, as I understand it,
16 she doesn't have any relationship with these people. She
17 never knew them, and so I guess to that point, why would she
18 look?

19 MR. REDD: Sure. She, she wouldn't inspect, inspect the
20 fences necessarily. I wouldn't -- it would be a stretch to
21 say, you know what, she's not driving by. Farmers may drive
22 by and look at each other's fences, that's what they do.

23 THE COURT: I understand that.

24 MR. REDD: Right.

25 THE COURT: But as I understand what she does for work -

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MR. REDD: Yeah.

THE COURT: -- as you stated, she works in town.

MR. REDD: Yep.

THE COURT: And she's, she's not involved in ranching or agribusiness.

MR. REDD: She wouldn't notice the fencing, but she would certainly notice a cow on the high -- on the side of the highway.

THE COURT: That's fair.

MR. REDD: Because that would stand out.

THE COURT: Yep.

MR. REDD: And in the 18 years that she's lived in her residence north of Garretson, the 18 years she's driven up and down Highway 11, the fencings been, no cattle has been out. She hasn't seen any cows out except for this one time. So, there's no evidence from her saying the fencing was bad or cattle had escaped previously. There's no records of the evidence from any other landowners that the fencing was poor or cattle escaped previously. Um, the plaintiff was on scene at the accident for 35 minutes. She took pictures of her car. She took pictures of the cow. Um, there's no inspection or analysis as to how the cow got out.

The plaintiff while she was there, the next day she drove by, nothing. There's nothing to show how this cow got

1 out, or that the fence was in poor shape, or the cow got out
2 because the fence is in poor shape. Um, the only evidence
3 from plaintiff's point of view that has to do with, um, the
4 cattle on the day of the issue, accident, she drove by
5 earlier in the evening. She was going to a concert, Miranda
6 Lambert concert. Her and her passenger drove by between 6:00
7 or 7:00, right before dark. No cows are out. And she's not
8 inspecting the fences, but she doesn't notice any cattle out
9 at least.

10 THE COURT: And it's a snowy, rainy night.

11 MR. REDD: Well, it's not night yet at that time.

12 THE COURT: Well, I mean later on when it happened.

13 MR. REDD: Sure. Well --

14 THE COURT: -- but there was precipitation when she was
15 driving?

16 MR. REDD: The, for the purpose of this motion, yes, the
17 accident report references that there had been some snow that
18 day. Um, her passenger testified that it was a clear night,
19 but, sure, for our purposes today there was some
20 precipitation. Um, but anyways, ah, so the evidence then in
21 the record is as of the day of October 12th, 2019, is from
22 Bruce, Bruce Heggen's affidavit that is submitted to the
23 court that reflects that he checks the fences. He checked
24 the fences, um, the day of the accident before he went to
25 bed, he checked 'em to make sure the cattle are still in,

1 everything's in place, like he does every night. This
2 pasture is literally right across the street from his house.
3 So, it's not like he's got to drive 20 miles up to check it
4 or something that he only sees every now and then. Every
5 time he gets in a car he goes by this pasture. And his test
6 --

7 THE COURT: -- and he's got a lot of money in that
8 pasture.

9 MR. REDD: Exactly.

10 THE COURT: So, in turn it would follow --

11 MR. REDD: -- yeah.

12 THE COURT: -- that he would be, pardon my expression,
13 but shall we say rather anal about checking on his cow/calf
14 pairs, and I think he had two bulls in that pasture, right,
15 at the time in question?

16 MR. REDD: A 109 cattle, cattle in there, and that's a
17 lot of money. It's his livelihood. It's not something he's
18 taking lightly and as reflected in his affidavit, he's
19 checking it before he goes to bed, he checks it. He doesn't
20 want 'em out. He doesn't want to lose his cows. He
21 certainly doesn't want anyone hitting his cows.

22 THE COURT: As I understand your client's testimony,
23 too, not only does he check it, ah, but he counts.

24 MR. REDD: Sure.

25 THE COURT: When he checks?

1 MR. REDD: But he's, I mean, there's cows, there's
2 calves, and there's, there's cattle in there at this point,
3 but, ah, grown ones. Um, by no means is he going in and is
4 he going to actually count every single one of them, but, um,
5 he can see if there's ones that are missing, um, if they're
6 out in the ditch, or in the road. It's going to be pretty
7 obvious. The snowy day we mentioned, there's no cow tracks
8 leading away, nothing of that nature. Everything's in per --
9 in, in the shape the fence should be in. The electric fence
10 is operational. It's in place, um, he goes to bed. That's
11 the condition of the fencing at the noted time. The accident
12 happens at 11:45. It's dark out. That's the first time he
13 ever hears of it. Um, and so that's the evidence as it
14 relates to the fencing leading up to the accident.
15 Plaintiffs have submitted no evidence contrary to Mr.
16 Heggen's affidavit. They've submitted nothing to address the
17 condition of the fencing or how this cow got out on that
18 date. Um, but instead what they, they want to do is hold the
19 defendants liable and turn them into basically the insurer of
20 everyone who drives down Highway 11 simply because the cow
21 was out, but you have to have evidence to substantiate this
22 allegation. Um, and, South Dakota, as you're well aware,
23 just because you get involved in an accident, you file a
24 lawsuit, doesn't mean every case goes to a jury. The purpose
25 of summary judgment is to weed out um -- unsubstantiated

1 claims and --

2 THE COURT: -- would you agree with me that the four big
3 cases in South Dakota relative to this proceeding here today
4 would be the *Casillas* case, the *Atkins* case. The *Zeeb* case,
5 and the *Pexa* case?

6 MR. REDD: I would.

7 THE COURT: Okay.

8 MR. REDD: As it relates to generally cattle getting or
9 cattle versus car accident.

10 THE COURT: Right. And I understand some of them were
11 trial cases, not all of them were summary judgment cases.

12 MR. REDD: Sure.

13 THE COURT: But those are the four big ones, you'd
14 agree?

15 MR. REDD: Yes, sir. And the big there with all of
16 those is you look at the facts of each case. You look at the
17 facts. What is the evidence.

18 THE COURT: One case, for example, in *Casillas*, you've
19 got two bulls and I think Judge Trandahl, if I remember
20 correctly, she granted summary judgment in that case and was
21 reversed by our Supreme Court. And it appears as though the
22 Supreme Court, as I read the opinion, was close to affirming,
23 but for the evidence where the defendant testified that these
24 two bulls in particular, and he had knowledge of these two
25 bulls fighting previously. And would you, would you agree

1 that that may be the one factor that the Supreme Court got
2 hung up on in terms of a genuine issue of material fact?

3 MR. REDD: I think that was the only issue, yes, I would
4 agree with that. Um, in fact that --

5 THE COURT: -- that was the, that was the factor that it
6 turned on. Actually, I think Judge Sabers sitting by
7 designation, my colleague, Judge Sabers, authored that
8 opinion.

9 MR. REDD: Right. And that's where here it was
10 important and it's noted that this isn't a case where as in
11 the *Casillas* case, cattle got out before. There's a question
12 as to whether the fencing is sufficient, which was to prevent
13 these animals from getting out. In our case, the undisputed
14 fact as reflected by the testimony of Bruce Heggen is, when
15 it comes to this pasture the last time a cow got out was in
16 2010, after that, he increased the fencing. He added the
17 high tensile strength or high tensile electrical wire to add
18 a more beefed up fencing.

19 THE COURT: Ah, and as I understand it, he checked it
20 the night of October 12th. He checked it after, and I just
21 want to be clear here, he checked it after he cleared that --
22 the cow off the road with his payloader, he went out and
23 checked it, and he put a Volt meter on the electric fence in
24 the middle of the night, and he testified that it was active
25 and working. Had not been breached in terms of its

1 functionality, and then he went out again in the morning, and
2 I know that there's a dispute when the sun came up the
3 following morning. I think Ms. Schmidt noted in her briefing
4 that it was 7:38 a.m., but his testimony was, is he was out
5 there at 6:00, the sun coming up, and he checked everything
6 again, everything's secured. I'm tracking those facts as --

7 MR. REDD: -- that is correct. That is what he
8 testified to in his deposition and stated in his affidavit,
9 yes, Your Honor. Um, so since upgrading the fence, putting
10 this high tensile strength instead of the, like a ribbon, a
11 little extra wire they had before, it's kind of flimsy. They
12 beefed it up. They have no issues. This cow gets out. So,
13 for nine years, between beefing up the fencing, adding the
14 high tensile, do the same maintenance plan, they have no
15 problems. Every May or June of the year, they -- he puts his
16 cows out there, takes them out, puts them back, does the same
17 process every year.

18 THE COURT: He had cows get out of other areas of his
19 place, but just not this pasture?

20 MR. REDD: Correct.

21 THE COURT: And if I understand his testimony, in
22 addition, I, I'm sorry if I appear as though I'm interrupting
23 you, Sir. As I understand your client's testimony as well,
24 he had, he had cattle wander on in different areas of his
25 place, he had cattle wander on to the neighbors, you know,

1 adjoining land, but since 2010, as far as the outer confines
2 of his place, for example, any of the outer perimeter that
3 joins up a county gravel road, or Highway 11, he hasn't had,
4 to his knowledge, any critter breach any of his outer
5 perimeters since 2010, aside from what happened on October
6 12th, 2019?

7 MR. REDD: Correct. And that's an important point is
8 the plaintiff's reference to two incidents. One where a calf
9 got stuck under a fence, I think that was cited.

10 THE COURT: I saw that.

11 MR. REDD: Well, first it's stuck under a fence. It's
12 hard to say it escaped. Two, it's a newborn calf. Three,
13 it's a different area, it's in the yard where they calf at
14 the house, and it gets stuck in the fence. So, that's not
15 the same pasture. It never actually gets out. It never
16 breaches the outside fencing. Um, and then there's a
17 reference to bulls that were fighting two days after the
18 accident, again, after the accident in a pasture. They went
19 through the partition fence fighting with the neighbor's
20 bull, but the boundary fencing is never breached. Cattle
21 always remain off the highway, remain inside, so that is all
22 correct.

23 THE COURT: So, bulls fighting similar to *Casillas*, but
24 bulls fighting after the incident?

25 MR. REDD: After and not getting onto the highway. They

1 don't get outside of the boundary fencing. They get in to
2 the neighbor's fence. It's a -- the fields are pastured off.
3 They get in -- breached the interior fencing, but not the
4 boundary fencing that keeps them off the highway. So they
5 never even get on to the highway. They never get out to the
6 highway, at all times they are still confined by fencing.
7 So, that makes this case a complete distinguishable from
8 *Casillas* because we don't have that you know a couple days
9 before, a few weeks before, the cows get out, the bulls get
10 out. You have this known problem, your fencing maybe needs
11 to be changed. We've got nine years without issues, um,
12 since making this improvement to the fencing. We also have
13 plaintiffs, even their own expert agrees the type of fencing
14 used is appropriate for this area. It's not like he's got a
15 single strand or two strand barbed wire fence. He's got a
16 highway next door, and you're saying should, should have done
17 more. He should have put more fencing up. A couple extra
18 strands, taken more measures to make a more secured fencing.
19 It's not the allegation.

20 THE COURT: There were two unannounced visits by their
21 expert?

22 MR. REDD: Correct.

23 THE COURT: One in April of '23. One in June of '23?

24 MR. REDD: Correct.

25 THE COURT: April, the fence is dilapidated. June, his

1 testimony was, it appeared adequate, but see your statement
2 that you just made --

3 MR. REDD: -- sure. Correct. My (unintelligible) it's
4 his testimony a five strand barbed wire fence is sufficient
5 restraint for cattle who are being pastured next to Highway
6 11.

7 THE COURT: And when he made his in -- his inspection,
8 his second unannounced inspection in June of 2023, the fence
9 was in the same or similar condition as it was in October of
10 2019?

11 MR. REDD: Correct. That's our, yes, Your Honor.

12 THE COURT: And, and he found it to be, well, first of
13 all, as you state, his testimony was he found it to be
14 adequate, that particular setup, but then in addition to that
15 when he visited unannounced in June of 2023, it was in
16 adequate operating condition?

17 MR. REDD: It was in -- inadequate or in space adequate?

18 THE COURT: It was, good catch. It was --

19 MS. SCHMIDT: -- in and adequate.

20 THE COURT: It was adequate and operational.

21 MR. REDD: In June, yes, Your Honor.

22 THE COURT: Thank you. Sorry about my slip of words, I
23 appreciate the correction. In June of 2023?

24 MR. REDD: Yes, when the cattle were actually there.
25 When he saw it, he said it was in appropriate shape, no

1 problems. When he saw it in April, when there were no
2 cattle, there hadn't been cattle there for, approximately,
3 six months. We got sixty inches of snow. Everything happens
4 throughout that time. He says he gets out there and looks at
5 the fence. It's, it's in bad shape. It's dilapidated. This
6 is in no condition to restrain cattle.

7 THE COURT: Well, we all know what happened in the fall
8 of 2022 and winter of '23 in to the spring.

9 MR. REDD: Um-hum, correct. Um, which gets me, I guess,
10 at the end of the day the plaintiffs hang their hat on
11 alleging there's a question of fact in this case based off of
12 their expert's testimony of when I look at this fence in
13 April of 2023, it was dilapidated, therefore, it must -- it
14 was so dilapidated it must have been in bad shape. That
15 doesn't happen in a year or two. Okay. This is three and a
16 half years later. You don't have any knowledge of the
17 condition. He's done nothing to, his opinion as to it's in
18 bad shape in April, it must have been in bad shape in
19 October, and that must be the way the cow got out, isn't
20 based on any evidence. It's -- there's no evidentiary
21 connection between his testimony as to the condition in
22 October, um, it's, it's not an exact (unintelligible), but
23 it's entirely speculative. I mean it's no different than if
24 I ask you go look at my pickup in the, in the parking lot,
25 and say, take a look at it, let me know what it looked like

1 three years now or three years ago. You'd say, well, maybe
2 it's in good shape now, must have been in good shape then.
3 Hit a deer, and I got it repaired. Um, you know, I had rust
4 touch up. Stuff happens. Go to your house and say, take a
5 look at the house. Well, there's no trees in the front yard,
6 therefore, there must not have been trees three years ago.
7 Well, maybe the city cut them down a couple years, two years
8 ago. I mean what we have is that fencing, that plaintiff's
9 claim has to be inspected daily, continuously to make sure it
10 stays in good shape. Three years that passed. Four winters.
11 Three summers. Um, they're exposed to all the elements.
12 Historic weather events, all of which affect this fencing.
13 You've got wildlife that can damage it. Everything happens.
14 None of which is accounted for, and there's no evidence to
15 say that, um, to support the contention that the fence was in
16 a similar shape in October, as it was in April of 2023. Um,
17 and in the absence of any evidence to substantiate that
18 requires then you know whether -- it's a pretty large,
19 speculative leap to make the conclusion reached by
20 plaintiff's expert as to the condition back in October, um,
21 and that simply is not admissible. It's speculative, and
22 it's not enough to avoid summary judgment. Um, and so at the
23 end of the day, all we have left is we have a fence. Five
24 strand fence with electrical wire that everyone agrees is the
25 appropriate type of fencing. It's the right material. It's

1 the right number of strands. We've got the fence in place
2 and operational on the night of the incident. The plaintiff
3 even says there's no cattle out when she drives by. Nothing
4 to conflict with Mr. Heggen's affidavit, and his deposition
5 testimony that the fence was in place. It worked fine. For
6 nine years, they hadn't had any problems. Um, the defendants
7 aren't the insurers of the safety of everyone. They don't
8 have to spend the night out in their field. Things can
9 happen after dark. Anything could happen that could allow a
10 cow to get out. Jump, um, jump the fence. It could break
11 off, you know, insulator. It could, shoot, who knows what
12 happens to cow. Um, but the fact of the matter is that the
13 fence, it's undisputed the fence was in the appropriate shape
14 and condition when, the evening of October 12th, 2019, somehow
15 a cow gets out. There's been no evidence that a cow got out
16 because due to the negligence of the defendants. Um, and, to
17 that point we've also got, um, once, there's also no evidence
18 that this isn't a case where we knew the cow was out, we
19 didn't go get it, um, or we had knowledge that there was an
20 issue, we didn't fix it. It's undisputed that Bruce Heggen
21 learned of this accident when the sheriff called him. That's
22 the first time he ever learned that a cow was out. Um, and
23 we don't have a case where there's a multiple at -- or three
24 horses, or a 100 cows, five cows get out. The one cow of a
25 109 that escapes. Again, they're sentient beings. They have

1 a mind of their own. There's a number of ways they could get
2 out that's not due to the negligence of the defendants, and
3 plaintiffs have presented no evidence that the cattle got out
4 due to the negligence of the defendants, um, which is the
5 premise of our case. It makes our case analogous to the
6 *Walborn v. Stockman* out of Kansas and *Lockline v. Amen*
7 [spelled phonetically] out of Nebraska, which have almost
8 identical fact patterns, almost identical allegations from
9 plaintiff. They've got summary judgment being affirmed
10 because there is no evidence that the defendant allowed his
11 cows to get out. There's no evidence the defendant was
12 negligent. Um, there's no evidence that this type of
13 accident was foreseeable given fencing used. Condition of
14 the fencing that evening, and the history of the fencing.
15 Um, and so our position is that the analysis in those cases,
16 fellow Midwest states, fellow agricultural-based states, just
17 like South Dakota, support the findings of entry of summary
18 judgment here given this record, um, simply because
19 defendants can't meet their burden.

20 Um, the negligence pro se claims, I don't -- they --
21 they don't, I don't think they're applicable at all
22 whatsoever. Um, it's set out in our brief. You have the
23 animal ordinance 52-17 that all it does is say that it
24 authorizes the animal control personnel that sees animals
25 that are outside of their confinement. It doesn't impose an

1 obligation on the landowner. It doesn't create a liability
2 to them. It just says --

3 THE COURT: -- it imposes no duty is your position?

4 MR. REDD: Correct.

5 THE COURT: Yeah.

6 MR. REDD: And if the animal's out, they could -- the
7 animal control could seize them without facing a liability
8 for taking someone's animal, or something happens to the
9 animal while the animal control is getting it, you can't
10 blame animal control, that's all it does. And even if it was
11 applicable in some, under some view, it requires a permitted
12 -- you got to permit the cattle to be out, even though
13 there's a prima facie evidence that the cattle were permitted
14 to be out. In our case we had, it's undisputed. There's not
15 an allegation that we permitted the cow to get out. As we
16 noted earlier in the hearing, it's our livelihood here. This
17 isn't a dog. It's not a cat. It's not a household pet.
18 It's our livelihood. There's no farmer in South Dakota or
19 rancher that's going to let their cattle roam free along the
20 highway. That's not an allegation made to conclusively
21 establish that that there was no permission to allow this cow
22 to get out or knowledge that the cow was out.

23 The other statute cited has to do with, um, ah, blocking
24 the right-of-way. You can't drop hay bales in the right-of-
25 way or leave junk on the side of the road. I don't think

1 there's any application. In this case, we didn't put the cow
2 there. Again, cow gets out.

3 THE COURT: You're drawing a distinction between an
4 animate and an inanimate object?

5 MR. REDD: Correct.

6 THE COURT: Obviously, cattle, they can have a bit of a
7 mind of their own, and they're free to move around.

8 MR. REDD: Yes, and the ordinance, the other ordinance
9 of the 46-14 has to do with is that in the snow removal
10 section. It talks about moving snow. They don't want stuff
11 in the right-of-way cause it doesn't affect the snowplow.

12 THE COURT: Well, as I understand it, the rationale
13 behind that is landowners that live adjacent to roadways
14 maintained by the county and/or state shouldn't be shoving
15 their snow out onto the shoulder or out on near the road when
16 the plows have to go by right.

17 MR. REDD: Correct, right.

18 THE COURT: It wrecks mailboxes, and it wrecks a lot of
19 things.

20 MR. REDD: I've got a snow plow --

21 THE COURT: -- it creates issues with culverts, as I
22 understand it, but I don't mean to digress too much.

23 MR. REDD: No, I got a snowplow flag in my pickup where
24 the snowplow hit it, hit my drive -- or hit my, my mailbox
25 this winter and not because I pushed snow out there, but it

1 happens.

2 THE COURT: Oh, we'll send somebody out to your house,
3 Sir.

4 MR. REDD: That's all right. They put it back up. It's
5 a little crooked, but it's up. So, you know, at the end of
6 the day, we've got negligence per se is not applicable. This
7 isn't a res ipsa case. There's countless ways a cow can get
8 out.

9 THE COURT: Do you agree if I deny summary judgment in
10 this case, then I need to make a determination as to whether
11 or not res ipsa would apply under the facts of the case as
12 tried at trial?

13 MR. REDD: Yes, Your Honor, I believe so, yeah.

14 THE COURT: Okay. And I, it would be my decision then
15 whether or not to grant the instruction based upon the
16 evidence presented at trial?

17 MR. REDD: Right. Ah, and what we've got, ah, we've got
18 the case law cites or res ipsa, so there's a number of
19 jurisdictions that say it's not -- the cattle can get out.
20 There's reasons they can get out that's not due to the
21 negligence. Um, we've got an ag-based state. It's South
22 Dakota. We've got more cows than people. Start to impose
23 liability on (unintelligible) res ipsa on these facts, um, I
24 mean it would certainly I don't think it'd -- it would be an
25 understatement to say it would be perhaps the farmers of

1 South Dakota have imposed a huge burden on them, which would
2 only be trickled down to the consumers who are the ones
3 buying the products that's gotten more expensive. Ah, and at
4 the end of the day, it's our position plaintiff has not
5 presented evidence to establish that she could meet her
6 burden at trial. Um, and for that reason we believe the case
7 should be dismissed.

8 THE COURT: Anything else, Sir?

9 MR. REDD: No, sir.

10 THE COURT: Ms. Schmidt, you have the floor.

11 MS. SCHMIDT: All right. I want to start off by talking
12 about a few broad tenets that I think go to the heart of the
13 dispute that we're talking about here. Number one,
14 circumstantial evidence is still evidence. It's not viewed
15 differently in the eyes of the law. And this tenet means
16 that a party can still bring a claim without having to be
17 present at the exact location when something occurred in
18 order to bring the claim. I think I described this in the
19 briefing with the hypothetical in the medical malpractice
20 setting.

21 THE COURT: The surgery.

22 MS. SCHMIDT: There --

23 THE COURT: -- the surgery you described as your
24 analogy?

25 MS. SCHMIDT: Yes. I mean, perhaps there's a better

1 one, but --

2 THE COURT: -- I tracked with what you were saying.

3 MS. SCHMIDT: You tracked?

4 THE COURT: Yeah.

5 MS. SCHMIDT: The, the second tenet is that defendant's
6 affidavit and testimony in this case about the fencing and
7 the conditions of the fence on the day of this collision and
8 the day after this collision, that can be disputable by
9 circumstantial evidence. Plaintiff is not required to create
10 disputes and material fact only if there is direct evidence
11 contrary to it. That's just not a law. And so --

12 THE COURT: -- as long as you're talking about his
13 affidavit, that did remind me of a question that I wanted to
14 ask, and I'm not sure if it's a typo, or if I'm not reading
15 correctly, but if I could direct you to your statement of
16 material your -- plaintiff's response to defendant's
17 statement of undisputed material facts and plaintiff's
18 statement of additional material facts.

19 MS. SCHMIDT: Sure.

20 THE COURT: Do you have a copy of that?

21 MS. SCHMIDT: I have a digital copy, yes.

22 THE COURT: Okay. Let me know when you're there.

23 Specifically, I want to direct your attention to page 17, P51
24 and P52, and I understand what you're getting at there about
25 the, the entries. You, you'd agree with me that those were,

1 for lack of a better term, escapes from different areas of
2 the land, of the, of the defendant's pastureland, um, and I'm
3 referencing 51.

4 MS. SCHMIDT: Sure. So, yes, I, I agree that we don't
5 have, we don't have any evidence to, to claim that this was
6 from the precise location.

7 THE COURT: Okay.

8 MS. SCHMIDT: That we believe the cow --

9 THE COURT: -- and it comes from the log sheet, and I
10 think that there's a, I think that there's a typo in 51. It
11 says 11-14. In my review of the file, I, I think you meant
12 10-14, didn't you?

13 MS. SCHMIDT: I, I did.

14 THE COURT: Okay.

15 MS. SCHMIDT: I apologize for that typo.

16 THE COURT: No, that's fine. I just want to make sure I
17 was square on that. Then moving along to 52, you referenced
18 Mr. Heggen's affidavit, paragraph seven and twelve. You also
19 reference Exhibit 16 this -- to the, what you, what you said
20 was 11-14 19 entry which should have been 10-14.

21 MS. SCHMIDT: Correct.

22 THE COURT: I understand that. I'm not seeing how
23 paragraph seven and twelve relate to what you state as an
24 undisputed fact in P52. Is that a typo, or am I not reading
25 it correctly, or could you clear that up? If you, as I look

1 back at Mr. Heggen's affidavit and that was filed on the 16th
2 of February.

3 MS. SCHMIDT: Sure.

4 THE COURT: As I review paragraphs seven and twelve of
5 that affidavit, I don't see that those --

6 MS. SCHMIDT: Pulling it up, one moment.

7 THE COURT: If you could just clarify what paragraphs in
8 seven or paragraph seven and twelve of Mr. Heggen's
9 affidavit, clarify for me how they relate to P52.

10 MS. SCHMIDT: Sure.

11 THE COURT: I might not be reading it correctly.

12 MS. SCHMIDT: One moment. Oh, and I see 52 is that
13 there was no citation received after the --

14 THE COURT: 52 states, the cattle were removed from the
15 pasture weeks earlier than usual after Bruce Heggen
16 discovered more of his cattle escaped from their pasture two
17 days after the Highway 11 collision. And you referenced his
18 affidavit paragraph seven and twelve, and then --

19 MS. SCHMIDT: Yes. So, so let me clear that up a little
20 bit because I think it goes to a point I wanted to make
21 today.

22 THE COURT: Are you understanding my question?

23 MS. SCHMIDT: I, I believe so. You're, you're trying
24 to, to figure out how the cattle being removed earlier, um,
25 addresses the cattle that escaped two days after the fact.

1 THE COURT: Yeah. And how paragraph seven and twelve
2 relate to that.

3 MS. SCHMIDT: Sure. So, so paragraph seven and
4 paragraph twelve talk about the timing of the rotation of the
5 cattle out of the pasture after this, this incident happened.
6 So, um --

7 THE COURT: -- well, paragraph seven just generally
8 talks about his rotation schedule, right?

9 MS. SCHMIDT: Right. And then para --

10 THE COURT: -- where does it say that he moved them?

11 MS. SCHMIDT: Paragraph twelve says that, um, on October
12 14th he moved the, the cattle to the home section.

13 THE COURT: Okay.

14 MS. SCHMIDT: Which is a different area.

15 THE COURT: Yep.

16 MS. SCHMIDT: So, those collectively together talk about
17 that. Um, you know, typically he says end of October,
18 beginning of November, that's when they're moved out of this
19 pasture where they were kept at the time, and then they were
20 moved October 14th to the home section, which is a different
21 location on the property.

22 THE COURT: Understood. But just to be clear here, the
23 critters referenced in paragraph, the, the reason then for
24 the, for the movement of the critters on October 14th didn't
25 have to do with this collision?

1 MS. SCHMIDT: Well, that's what they're, they're
2 claiming, but I, I actually do have something I'd like to
3 tender now, and I believe it might make sense to mark this as
4 Exhibit 32. It's some additional excerpts. May I approach?

5 THE COURT: Yes. And, and you would agree, and I'll
6 wait, wait to respond until you're back in front of a
7 microphone, you would agree that those, those breaches, or
8 we'll call them critter escapes that are logged on 10-14-19,
9 those were different areas of his, of his place. They
10 weren't, they weren't escapes from the area in question?

11 MS. SCHMIDT: I, I will concede that it was a different
12 area. I will not concede that it's not relevant to this
13 whole discussion.

14 THE COURT: I'm not saying, I'm not, I'm not saying it's
15 not relevant. I'm just saying factually it happened in a
16 different area.

17 MS. SCHMIDT: Yes.

18 THE COURT: In turn, and you heard my discussion with
19 Mr. Redd about how this court did not identify any evidence
20 of critters, cattle breaching the outer perimeter of the
21 Heggen property since 2010. Factually, you would agree with
22 the court as to that?

23 MS. SCHMIDT: Yes. I agree there's no evidence of
24 cattle escaping this particular pasture after the prior
25 escape that's I guess discussed --

1 THE COURT: -- okay, or anywhere, anywhere on the outer
2 confines of the property controlled by the defendants for
3 pasture purposes.

4 MS. SCHMIDT: Um, in terms of outer confines, ah, I
5 don't know --

6 THE COURT: -- or outer perimeter, I think is the word I
7 used with Mr. Redd.

8 MS. SCHMIDT: And I guess I'm struggling maybe with the,
9 the definition of it because they're, um, there certainly
10 were breaches of, of the perimeter, um, I, I hate to get
11 hyper technical.

12 THE COURT: Okay. Go ahead.

13 MS. SCHMIDT: Um, what I've tendered here and I, I just
14 want to make sure we're, we're talking about the, the
15 rotation of the cattle, and how this year it was abnormal.
16 This is excerpts page 21, um --

17 THE COURT: -- and I should say this is, you, you want
18 this marked as plaintiff's 32?

19 MS. SCHMIDT: Yes.

20 THE COURT: Okay.

21 MS. SCHMIDT: 32, that'll, um, that'll I guess continue
22 with --

23 (Exhibit 32 was marked for identification.)

24 THE COURT: -- Mr. Redd maybe being a little hyper
25 technical here, but any, any objection to the court receiving

1 it for the purposes of this hearing only?

2 MR. REDD: What is it?

3 THE COURT: She provided you a copy. It appears to be
4 an excerpt of a deposition.

5 MR. REDD: Who's?

6 MS. SCHMIDT: Bruce Heggen.

7 MR. REDD: I have no objection.

8 MS. SCHMIDT: Okay. So, in this excerpt, Mr. Heggen
9 speaks about how typically he weans the calves in November or
10 December, and then the cows stay out on stalks in the
11 pasture, that's this pasture number one. We're talking about
12 the cattle. And then he says he locks the cattle up for
13 calving in mid-February. So, the reason I'm pointing this
14 out is because the affidavit in those paragraphs the court
15 addressed earlier, paragraph seven and paragraph twelve, it
16 talks about how the end of October, beginning of November is
17 when the cattle are moved back to the home place. He made
18 this move on October 14th of 2019. That is in conflict with
19 the deposition testimony, and so I disagree with defendant's
20 position that everything that was said in deposition and
21 that's in the affidavit is consistent and, and identical, and
22 this is one example of where we have discussion in this
23 deposition about how the cattle remain out in this pasture
24 much longer than the affidavit claims.

25 THE COURT: Understood.

1 MS. SCHMIDT: Why that's important? Number one, it
2 establishes circumstantial evidence that due to the issues in
3 fall of, of 2019, they, they changed their practices after
4 the second round of cattle got out due to issues with fencing
5 near creeks. Um, two days after the collision, they're,
6 they're taking this cattle and bringing them back to the home
7 place, whereas, typically at least based upon this deposition
8 testimony that happens, um, locked up mid-February. They
9 stay out in the pasture for most of the winter. I know it's
10 hotly contested of what -- when the cattle leave and, and how
11 the fence it goes into disrepair in the winter months. We do
12 have testimony about these cattle remain out there, um, and I
13 guess I wanted to, to point that out.

14 Um, let's see, um, the other, the other thing to point
15 out, and I can give the court citations to the record here.
16 Is it's, it's another situation where the affidavit is at
17 odds with the deposition testimony. Um, the affidavit
18 paragraph fourteen talks about how Mr. Heggen and I'll say
19 Bruce Heggen tested both the fencers, um, you know, the, the
20 electrical part of the fence, as well as checked the, the
21 barbed wire fence both the morning and the afternoon the day
22 of the collision. But in, in the deposition, his testimony
23 was not that. His testimony was that his habit and routine
24 practice in checking this fence was checking the lights that
25 showed how the electrical fence that that was electrified.

1 He checked those lights twice a day, and then he checked the
2 perimeter of the fences on these ATVs about two to three
3 times a week. And so what we have in the affidavit is at
4 odds with what's in the deposition. I think that's --

5 THE COURT: -- do you have a site to the deposition
6 specifically?

7 MS. SCHMIDT: Yes. That's, um, if you look to Exhibit
8 13 on pages 32 through 33 of Bruce Heggen's, um, deposition,
9 there was a question about his routine practice with
10 monitoring the fencing and compare that to paragraph 14 of
11 Bruce Heggen's affidavit, that'll be the, the difference
12 there. And from what I understand, the court is well aware
13 of the facts and he's been deep into this submission, it's
14 quite lengthy. To summarize, problem number one, we have the
15 flooding, September of 2019. It's historic. Split Rock
16 Creek at Corson. I provided the court with the governmental
17 data from the gauge station there that shows how high those
18 water levels got. That gauge station is about maybe one to
19 two miles as the crow flies away from the precise location of
20 the creek that intersects with the bridge on Highway 11 when
21 this happened. The river goes up. The river goes back down,
22 and then Bruce Heggen testifies he has to get back out there
23 and fix the fences. As the courts discerned, there is no
24 evidence, or documents, or records showing when these fences
25 were repaired. Bruce Heggen didn't testify that he repaired

1 these fences before the collision happened. There's no
2 evidence in his, his deposition about that. Neither his depo
3 nor his affidavit established exactly when the fence was
4 repaired. So, due to not having that information, um, our
5 view is that there's, there's circumstantial evidence that a
6 reasonable inference can be made that those repairs didn't
7 happen before this occurred just one month after the creek
8 hit the historic highs, and, of course, that water level
9 would have to recede before anybody was able to go out there
10 and repair the areas of fence that were waterlogged and
11 damaged by the extensive flooding and problems that happened.

12 Then, then we have the, the collision at issue. I think
13 the court's aware of our position that there certainly is
14 evidence that exists. It may not be direct evidence, but
15 there's circumstantial evidence that, that the fence was, was
16 in disrepair. And I'm talking about this to independent of
17 our expert witness's opinions based upon his review of the
18 record in this case. There's, there's evidence that exists
19 even outside of our expert testimony. Um, we have, we have
20 this area of fence, um, and this pasture that's at issue.
21 That has not changed. The perimeter has not changed, and the
22 design of the fence has not changed either, um, you know
23 between now, um, and, and at the time of the collision. So,
24 when our expert witness is going out there from the public
25 right-of-way to look at this fence, um, we, we know there has

1 not been changes, at least to the configuration, and the
2 perimeter of the fence, and I, I understand that to be
3 undisputed.

4 So, it's not a situation where something's been
5 completely reconfigured and, and redone. The, the lines of
6 the fencing are, are drawn in different areas. The fence
7 follows the same location as it did in 2019, and the, the
8 perimeter of the fence remains in the same configuration with
9 the same types of materials.

10 So, it's not that any evaluation of the fence at this
11 time is, is completely irrelevant. Yes, there might be some
12 issues with the weight of, of the viewing of the fence at the
13 time. I don't think there's an admissibility issue because
14 there's at least adequate evidence to show that it's
15 substantially similar in configuration and location as the
16 time before, uh, at the time the collision happened.

17 THE COURT: But you'd agree with me April of 2023 is
18 pretty, I mean that's fairly removed from October 12th of
19 2019?

20 MS. SCHMIDT: Oh, I mean I'm, I'm not going to, um, deny
21 the passage of time, we certainly can't. That said, when
22 you're looking at a fence that's with the same materials and
23 the same configuration, the same perimeter, and the same
24 rotation of cattle as was done the year of the collision,
25 there is admissible evidence there. And Mr. Redd, I'm sure,

1 will love to vigorously cross-examine our expert witness
2 about the weight of his evaluation and, um, whether or not
3 it, it can hold water in front of the eyes of the jury,
4 certainly. But in terms of it being admissible, um, I, I
5 stand strongly that it is admissible to say, hey, look to the
6 fence. We have testimony from his, um, the, from Mr. Heggen,
7 Bruce Heggen, that it hasn't changed, and we have, um,
8 testimony from our expert saying, hey, this doesn't just
9 happen in one season one year. This is a long-standing
10 thing, and that taken with all the circumstantial evidence
11 that we've gathered about the flooding. It's undisputed that
12 there was fences in disrepair after this flooding, and
13 there's no, no evidence of the timing of those repairs, um,
14 it's not speculation. It's --

15 THE COURT: -- other than what he --

16 MS. SCHMIDT: -- (unintelligible) evidence.

17 THE COURT: -- testified to as to what he did the night
18 of the incident? When you say there's no evidence that the
19 repairs were ever made, I mean he did testify that the night
20 of the incident, or the day of the crash he checked, and he
21 checked that night. And I understand your argument, and I,
22 and maybe I'm, and I understand what you're saying about the
23 deposition testimony versus the affidavit testimony, and I'm
24 going to go back and, and look at all of that, okay. Um,
25 there, there's my, there's my, my queue. I'm not going to

1 bench this today. Um, but and I'll, and I'll go back, and
2 I'll look, and I'll review the deposition testimony versus
3 the affidavit testimony, but in terms of the affidavit it
4 appears to me he was describing what he did that specific day
5 versus what his general practice was. With that being said,
6 I understand your argument about the flooding and the data
7 you submitted, but you would acknowledge that his testimony
8 was on the date of the incident I checked it. After the call
9 from the sheriff's office, he checked it again. Checked it
10 with a Volt meter, and then he went out at 6:00 a.m. later on
11 that morning and checked it again.

12 MS. SCHMIDT: That's the affidavit.

13 THE COURT: That's, that's what he testified to.

14 MS. SCHMIDT: That's the affidavit.

15 THE COURT: Affidavit, yep.

16 MS. SCHMIDT: Affidavit testimony, yes, includes that.

17 THE COURT: I hate to do this to you, folks. Um, we
18 scheduled it for a half hour, and I knew it was not gonna
19 make it in a half hour, but I've got to do the 11:00 o'clock
20 signing.

21 MS. SCHMIDT: Sure.

22 THE COURT: So, if you folks don't mind just sitting
23 tight, and I, I want to finish this today. I don't want to
24 bring you back another day. I'm mindful of what you said on
25 the e-mail, Mr. Redd, about April 5th. So, if you had plans

1 for lunch, I apologize. If we could just take a brief recess
2 and then as soon as we're done with the 11:00 session, I'll
3 summon everybody back into the courtroom.

4 MS. SCHMIDT: Sure.

5 THE COURT: And we'll finish this up, okay. I want to
6 make sure that you have adequate time to finish your
7 arguments, ma'am, and, Mr. Redd, whatever you have for
8 rebuttal, and so forth. As far as the people who are on the
9 Zoom is concerned, or as far as the Zoom's concerned, I'm
10 just going to go on mute, and I'm going to leave it running,
11 and we'll get going again as soon as we can. Is Mr. Shapiro,
12 Mr. Quaintance, Ms. Frerk, did you hear all that?

13 MR. QUAINANCE: Yes, Sir.

14 MS. FRERK: Yes, thank you.

15 THE COURT: All right. Thanks, folks.

16 (Recess at 10:59 a.m.)

17 (Resume at 12:00 p.m., with all parties to the action
18 duly present via zoom and in person.)

19 THE COURT: It's now one minute after noon, so I'll just
20 say good afternoon, everyone. We're back on the record in the
21 matter of Amber Elizabeth-Elizabeth Frerk versus Leo Dean
22 Heggen, Joanne B Heggen and Bruce Heggen. This is CIV file
23 22-2356. We did take a brief recess, as we started at
24 approximately 10:00 a.m. on or as to defendants' motion for
25 summary judgment, we ran out of time. The court has now

1 conducted the 11:00 o'clock court session, so it's,
2 approximately, 12:01, and we're back on the record to
3 conclude arguments relative to this motion. Ah, I would note
4 that Mr. Quaintance, as well as, Mr. Shapiro are back on the
5 Zoom and Ms. Kylie Schmidt, ah, also is back in the courtroom
6 as she's been handling the argument personally on behalf of
7 the plaintiff. The plaintiff herself is also back on the
8 Zoom. Prior to going on the record, the court double checked
9 that everyone who's monitoring via Zoom could hear. Mr. Redd
10 is back in the courtroom on behalf of the defendants.

11 Ms. Schmidt, you may continue with your argument.

12 MS. SCHMIDT: Sure. I, I believe we left off talking
13 about how the condition of the pasture even in 2023, um, does
14 have relevance to --

15 THE COURT: -- that's exactly where we left off --

16 MS. SCHMIDT: -- back in October, 2019 --

17 THE COURT: -- of I should say that's exactly where you
18 left off.

19 MS. SCHMIDT: Well, I'm glad I, I remembered after a
20 recess, but I'd like to direct the court to Exhibit 21.
21 This was a photograph used during the deposition of Bruce
22 Heggen, and let me know when the court's oriented, and I'll
23 continue when you're prepared.

24 THE COURT: I'm there. Do you have a color copy with
25 you?

1 MS. SCHMIDT: I do. May I approach?

2 THE COURT: Yes. Thank you. I'll give it back to you
3 when you're done making your point about this particular
4 exhibit. It's just helpful to have a color copy.

5 MS. SCHMIDT: Sure. And the court can keep that if it's
6 helpful.

7 THE COURT: Um, so number two is to Mr. Heggen's
8 deposition. Number twenty-one for purposes of your
9 responsive pleadings?

10 MS. SCHMIDT: Correct. During Bruce Heggen's
11 deposition, he was asked to mark with dotted lines on this
12 photograph where fence-line was repaired in 2019 due to the
13 flooding, and as the court can see where the number eleven is
14 on the north-south road, um, that's approximately where the
15 bridge is located over Split Rock Creek.

16 THE COURT: Number eleven, namely Highway 11?

17 MS. SCHMIDT: Correct. And then the southwest edge of
18 that pasture land with the dotted lines, um, that is the
19 location that Dr. Little has testified, more likely than not
20 was the location where, um, the cow got out of the enclosure.
21 And what's unique about that location as he testifies is the
22 topography of the area has some rolling hills or undulations
23 that that make it challenging for the tension in the fence-
24 line to be appropriate. Where, um, there's additional
25 tension on the barbed wire strands as well as the high

1 tensile wire in locations where, where that fence would go
2 downward into, um, even a small valley, and so what he, um,
3 understands more likely than (unintelligible) occurred is
4 that there was damage to the fence, and in this valley that,
5 you know, perhaps was not easily visible from the roadway.
6 And the tension of this high tensile wire being pulled
7 downwards, um, got loose and allowed the cow to walk
8 underneath, ah, this fence where that high tensile wire may
9 have broken or, or become loose. And so I point that out to
10 the court --

11 THE COURT: -- I hear you say may have broken. We don't
12 have anybody that can actually testify as to, or I should say
13 you don't have a witness that can testify as to the actual
14 condition of that on the date in question though, correct?

15 MS. SCHMIDT: Ah, I say incorrect.

16 THE COURT: Okay.

17 MS. SCHMIDT: He --

18 THE COURT: -- how, how so?

19 MS. SCHMIDT: -- he has testified that more likely than
20 not the cow is (unintelligible) in that location due to the
21 unique topography of the fence, and due to the surrounding
22 conditions of the wet, um, the wet conditions that push these
23 cattle towards the fence-line. And so, um, it's, it's
24 undisputed and at least, ah, Mr. Heggen testified that when,
25 when the creek gets full and fills up, it pushes the cattle

1 closer to that fence-line. So, you have a higher likelihood
2 of cattle brushing across the fence, breaking fence, um, in
3 addition to the damage to the fence that occurs from
4 waterlogged posts, and, and rushing water impacting the
5 integrity of the fence. And, and it's not disputed that we
6 have, um, that this exact area right here by the bridge and
7 also on the north, northeast side of this bridge, um,
8 required extensive repair after the flooding in September of
9 2019. Now, as, as the courts discerned, we don't know when
10 that repair happened. There's no documentation of it.
11 There's no testimony of it, and we know it just happened
12 after this flooding happened, which is in the weeks, um, when
13 this collision occurred. The weeks preceding, the weeks
14 after, um, you know, circumstantial evidence suggests that
15 because this, this cow escaped because of the water invasion
16 in this area, that there was damage to that fence at the time
17 this collision happened. And we have an expert to say more
18 likely than not that's where the damage was due to the nature
19 of, of the, the conditions, the fence, the topography of the
20 land.

21 Mr. Redd relied on several out of jurisdiction cases to
22 identify how this case is factually distinguishable, um,
23 broadly speaking, I wanted to point out for the court that we
24 do have testimony that gates have been left open in the past.
25 We do have testimony that people have trespassed on this land

1 for the reasons of fishing and so --

2 THE COURT: -- but Bruce can't control that, can he? I
3 mean someone, if someone decides they're gonna trespass on
4 Bruce's pasture and go fishing, and they cut barbed wire to
5 go in and fish, you're not asking this court to find Bruce
6 negligent or, or let's say they, they don't cut barbed wire.
7 You know where I come from, I, I grew up hunting in South
8 Dakota, western South Dakota, been doing it, and I'm not
9 gonna tell you how old I am, I'm old. Been doing it since I
10 was 12 years old, but where I come from when you're out
11 hunting, ah, you approach a gate, you know, and obviously I
12 had permission to be on whatever land I was on --

13 MS. SCHMIDT: -- for the record.

14 THE COURT: -- but you approach a gate, you open it, you
15 drive through it, the first thing you do is you shut it. I
16 mean you're not asking me circumstantially direct evidence to
17 hold Bruce responsible for somebody cutting his fence. I
18 mean, I see what you're getting at there. You're saying you
19 ask me to consider holding Bruce responsible for not fixing
20 it, ah, if he knows about it. Am I tracking that correctly?

21 MS. SCHMIDT: Let's --

22 THE COURT: -- I mean, you're not, you're not asking me
23 to hold him, hold him, or at least find that there's a
24 genuine issue of material fact that Bruce was arguably
25 negligent because someone else cut his fence?

1 MS. SCHMIDT: No. But how the court must consider this
2 based upon the *Casillas* case, is that is part of the totality
3 of circumstances the court must consider in a, in, in, in
4 assessing whether or not there's disputes of recent, disputes
5 of fact --

6 THE COURT: -- the sent --

7 MS. SCHMIDT: -- as to whether or not the --

8 THE COURT: -- the test in *Casillas*, the facts of the
9 case, consider the character of the road, the kind of traffic
10 they're on. The time of day and the other, the other
11 pertinent facts, and the surrounding conditions to determine
12 whether the defendant should have reasonably anticipated the
13 danger. So, how does Bruce reasonably anticipate the danger
14 when somebody comes and cuts his fence? And he, and he, and
15 there isn't evidence in the record to demonstrate that he
16 knew about it.

17 MS. SCHMIDT: Right. Whether or not he -- there is
18 evidence in the record that the Heggens knew about this.
19 They knew that people would go fish. They allowed people to
20 fish.

21 THE COURT: But I'm talking about a specific incident at
22 the time in question.

23 MS. SCHMIDT: Okay.

24 THE COURT: Because it the, what, what his testimony is,
25 is he checks it on the 12th of October, and he doesn't testify

1 that he saw anybody who had potentially cut his fence and
2 went fishing, or he didn't note anything of the sort.

3 MS. SCHMIDT: The standard is not whether he knew about
4 an adverse condition on the day of the collision.

5 THE COURT: No, the standard is, is should he have
6 reasonably anticipated the danger?

7 MS. SCHMIDT: Correct. And so, yeah, having those
8 circumstances, knowing that other people access property,
9 knowing that gates can be left open, I'm not asking the court
10 to impose liability on him simply because that occurred. I,
11 I want to make sure the court realizes this is not as
12 defendants frame it. A case where just a cow is in a roadway
13 and nothing more. There's a lot more here. There's evidence
14 of fishermen. There's evidence of peop -- them allowing
15 people on their property. There's evidence of gates being
16 found open in the past. There's evidence of flooding.
17 There's expert evidence of the assessing the integrity of the
18 fence in light of all of the circumstances. And, yes, while
19 Dr. Little wasn't there in October 2019, surely defendants
20 are not saying that a forensic expert is never able to offer
21 or render opinions based upon the testimony of the
22 defendants, and the, the evidence in the case.

23 So I'm, I'm pointing this out, I guess to draw a
24 distinction between how defendants are framing this. This is
25 just a cow on the road and nothing more and the court can't

1 impose liability here to say, when you view this through the
2 lens of *Casillas* and the other cases that you've set forth
3 that we've cited in our brief, and you assess all of these
4 factors, in our view, it becomes clear there are disputes.
5 There is evidence and this is exactly the kind of case that
6 should reach a jury.

7 THE COURT: Do you agree that factually this case is
8 different from *Casillas*? Well, certainly, I mean, there's

9 MS. SCHMIDT: Well, certainly. I mean there's not,
10 there's not bulls, um, it, it was not a bull on the road. It
11 was a, a cow on the road. But, but what's syn --

12 THE COURT: -- we don't have bulls fighting in this
13 case?

14 MS. SCHMIDT: We have bulls fighting in this case.

15 THE COURT: Oh, we don't have bulls fighting, we don't
16 have bulls fighting at the time of the incident. I should
17 have --

18 MS. SCHMIDT: -- that we know of, true.

19 THE COURT: You're correct.

20 MS. SCHMIDT: Um, but what's, what's analogous to
21 *Casillas* is these circumstances that put the landowner or the
22 cattle owner on notice that there was a problem before the
23 incident occurred.

24 THE COURT: Okay. So, summarize then --

25 MS. SCHMIDT: -- and that's the common thread.

1 THE COURT: -- for me. What did Bruce do wrong then?

2 MS. SCHMIDT: Sure. He failed to appropriately maintain
3 the fence in light of the circumstances and the extensive
4 damage that happened directly adjacent to this bridge to
5 allow this cow to get out. We have expert testimony
6 identifying that based upon, at least the, the deposition
7 testimony that Mr. Heggen would look at the lights indicating
8 that this electric fence worked, but the lights alone doesn't
9 show whether or not the electric fence is appropriately
10 aligned to deter cattle from going through when there's any
11 integrity issues or problems.

12 We also have Mr. Heggen and the rest of the Heggens
13 knowing that this pasture was essentially under water and
14 waterlogged after the historic flooding. And despite as in
15 in one of the exhibits, um, let's see Exhibit 14, we have all
16 of the different numbered pastures where the Heggens have
17 access to, to run their cattle, and they rotate their cattle
18 through all these different pastures over the course of the
19 year. Despite having access to all these other enclosures
20 that aren't, as they would describe river bottom, um, they
21 kept those cattle in that pasture along the highway in the
22 month after this happened and didn't move them when they knew
23 there was all this damage. They knew about the traffic on
24 the road. They knew there was a risk of injury to a
25 motorist.

1 So, it's more than just the negligent maintenance of the
2 fencing, and the negligence monitoring of the fencing, but
3 it's also the negligent keeping of these cattle in that
4 pasture alone when there's other options that exist in light
5 of the circumstances and, and how extensive that flooding was
6 and undisputably how horribly damaged that fence was as a
7 result. And then to briefly touch upon negligence per se
8 and, um, the arguments there, for the most part, I'd like to
9 rely upon what's been raised in the briefs, but want to rebut
10 one point that Mr. Redd brought up today.

11 THE COURT: I have one question before you do that.

12 MS. SCHMIDT: Sure, sure.

13 THE COURT: Is there any statute, South Dakota statutory
14 authority to support your argument relevant or relative to
15 negligence per se? Can you identify any state statute for
16 me? I'm not trying to play hide the ball or anything like
17 that, but every state statute that this court was able to
18 identify contemplated, and the legislature, I suspect, in
19 keeping with our state being an agricultural ranching state,
20 ah, and I'm not going to try to get in the legislature's
21 head, I'm just here to figure out what they said and how it
22 applies, but the statutes that this court was able to
23 identify had to do with the trespass of critters.

24 MS. SCHMIDT: Um-hum.

25 THE COURT: As to adjoining properties, namely, ah, I

1 should remember the numbers, but there's a lot running
2 through my head here with this case, namely SDCL 40 -- I mean
3 the statutes that that I looked at were SDCL 40-28-1; 40-28-
4 3; 40-28-4, and you know there's -- it basically runs from 48
5 -- or 40-28-1 all the way up to and including 40-28-26.
6 Those statutory schemes certainly contemplate lawsuits
7 involving livestock, but where you can't identify for this
8 court anywhere in the South Dakota Code that statutory auth -
9 - statutorily authorizes a negligence per se claim relative
10 to our facts here.

11 MS. SCHMIDT: So, I have not identified anything in the
12 South Dakota statutes. The negligence per se claim arises
13 from the county ordinances that we provided to this court,
14 but in terms of negligence per se, I, I just wanted to be
15 clear, negligence per se is a doctrine that exists in the
16 common law. It is not something that, um, I guess there
17 would be a statute that would say, hey, negligence per se is
18 permissible because this statute exists. No, it's a, it's a
19 common law doctrine that's then applied to either statutory
20 law or other applicable law that applies to the people
21 within, and so I think the court's correct. I have not been
22 able to identify anything in the South Dakota code, but
23 that's not to say that the negligence per se concept fails
24 due to the Minnehaha County because it's an ordinance from
25 the county rather than the statute.

1 THE COURT: How do these ordinances place a duty upon
2 the defendants?

3 MS. SCHMIDT: So, let's divide out the impact of these
4 ordinances in, in two different fashions. These ordinances
5 can exist as evidence of the ordinary care imposed on the
6 people to whom they're applicable to. Okay. That exists
7 independent of negligence per se. Example, negligence case,
8 there's a policy, right. A, say, an employment policy, and
9 there's a slip and fall case. That policy can be introduced
10 as evidence of the standard of care even though it doesn't
11 inherently and undisputably establish the standard of care.
12 So that's silo one. These ordinances exist to inform and
13 provide evidence of the standard of care in plaintiff's view.
14 Silo two, is, you know, getting negligence and establishing
15 negligence in, in and of itself, through the application of
16 the ordinances. And so when the court's looking at these
17 ordinances, number one, they can be viewed as evidence of the
18 standard of care without the application of negligence per
19 se. Number two, they can be used by plaintiff at trial to
20 say, hey, here is the law of accounting. This law applies to
21 the people involved in this case, and as the jury instruction
22 states in our brief, here's what it says and if you determine
23 that the defendants violated this statute, then they were
24 negligent.

25 THE COURT: But would you agree with me that Minnehaha

1 County Ordinance 52-17, Section 302, as I read that statute,
2 it doesn't appear to contemplate car crashes or injuries from
3 car crashes, or essentially anything involving a third party.
4 It looks to me like it authorizes law enforcement to take
5 possession of a critter that can move around and has free
6 will, well, to some extent, ah, can move around on its own,
7 if you will.

8 MS. SCHMIDT: There is no requirement that a statute
9 create a private right of action in order for it to be used
10 as negligence per se. There's, there's no requirement that a
11 traffic safety law allow a plaintiff to sue a defendant --

12 THE COURT: -- but doesn't it need to create a duty?

13 MS. SCHMIDT: No, it doesn't. It doesn't need to create
14 a duty.

15 THE COURT: Okay.

16 MS. SCHMIDT: It, it must apply to the people to whom
17 you're intending for it to apply, and as the precursor to
18 that statute, if this is for the health and safety of people
19 in Minnehaha County. Um, an unincorporated Minnehaha County,
20 which is exactly where Ms. Frerk is a resident of and also
21 the defendant. So, I don't think there's any dispute that
22 this, that ordinance in particular applies to all of the
23 litigants in this case, and it explicitly said it's for the
24 safety of, um, of folks in the county.

25 Um, defendants on the negligence per se issue have

1 argued that, ah, you know the, the statute you know they're,
2 they're -- the defendants did not permit the cow to roam at
3 large. Well, if the court closely looks at the statute or the
4 ordinance itself of about being at large, this -- the
5 ordinance does not say that that is a requirement. It says
6 that if an animal is unaccompanied, it's prima facie evidence
7 that the defendants permitted it to be at large. And so
8 they're trying to draw this distinction about what precisely
9 the ordinance says and argue that they didn't permit it to be
10 out, but that's not a requirement under the statute. You get
11 to the prima facie evidence because it's undisputed that this
12 cow was not accompanied on the road.

13 And then the last piece on the res ipsa that was briefly
14 touched upon earlier, um --

15 THE COURT: -- you agree with what my, my dialogue with
16 Mr. Redd regarding that? You agree with it?

17 MS. SCHMIDT: I don't think the court has to address the
18 res ipsa loquitur application at this juncture. If the
19 court's to deny summary judgment, I think that becomes a
20 trial issue on whether or not --

21 THE COURT: -- whether or not based upon the evidence I
22 give the instruction?

23 MS. SCHMIDT: Correct.

24 THE COURT: And I think that's exactly what I visited
25 with Mr. Redd about.

1 MS. SCHMIDT: Okay. Thanks for clarifying, but --

2 THE COURT: -- I didn't mean to cut you off there, sorry
3 about that.

4 MS. SCHMIDT: But, if, if the court does decide this is
5 the case as defendant frames it, um, that the cow on the road
6 is the only evidence that exists, then it's precisely the
7 case where that the application of that doctrine fits, and I
8 think if the court determines that there is disputed facts,
9 and there is evidence here that that refutes it, um, that
10 creates, disputes the facts that render summary judgment
11 inappropriate at this stage. Then the res ipsa issue doesn't
12 need to be addressed. But if the court determines that there
13 is no evidence other than the cow on the roadway, it's
14 plaintiff's skew that that res ipsa loquitur must be
15 considered before summary judgment is, is denied, um, due to
16 you know, findings that, that perhaps there's, there's no
17 explanation, or there's no reason, or there's no evidence
18 that exists other than the cow on the roadway.

19 THE COURT: Anything else?

20 MS. SCHMIDT: So, I'll conclude by saying summary
21 judgment, excuse me, summary judgment in negligence cases
22 like this, it's rare, and as the *Casillas* case explicitly
23 says, this -- these issues about these circumstances, um,
24 condition of the roadway, all of these pieces are for the
25 fact finder, which the court can't act as right now, and a

1 jury more appropriately should hear this case.

2 THE COURT: But *Casillas* does not stand for the
3 proposition that you can't grant summary judgment, correct?

4 MS. SCHMIDT: Oh, true.

5 THE COURT: Yeah.

6 MS. SCHMIDT: I mean, it's, it's, ah, um --

7 THE COURT: -- you're stating, as I understand it,
8 they're extremely fact driven?

9 MS. SCHMIDT: Correct.

10 THE COURT: Okay.

11 MS. SCHMIDT: Correct. And we have robust evidence that
12 we've set forth, albeit circumstantial, that demonstrates
13 that that negligence occurred here.

14 THE COURT: Mr. Redd.

15 MR. REDD: A couple of points I want to address, try to
16 keep it short. Um, circumstantial evidence for speculation,
17 there's certainly a line between the two. Um, circumstantial
18 evidence is, is, ah, an inference that can be drawn based off
19 of the evidence, but where you have to speculate, um, or make
20 educated guesses, or assume facts, you're speculating. Here,
21 we've got no evidence that the condition of the fencing was
22 not in the proper condition on the date of the accident.
23 Plaintiff's counsel says, well, it rained a bunch in
24 September. The fence might have been in bad shape. They,
25 they're directly contradicted by the testimony of Bruce

1 Heggen, again if there's no evidence that the fence was in
2 poor shape, um, you have to make this assumption to get to
3 the conclusion that just because it flooded the month before
4 that that must mean the fence was damaged on the day of the
5 accident. You have to have something to connect these two,
6 and there's nothing. There's just this guess. Um, to that
7 point, when Bruce Heggen was deposed, plaintiff's counsel
8 asked him about what he observed the fencing when it was wet
9 in 2019.

10 THE COURT: Where are you at in the deposition?

11 MR. REDD: Yeah, it's page 28. I don't know if page 28
12 made in the record and to be safe, I got a copy of it during
13 the break. I'll give you this.

14 THE COURT: What do you want to?

15 MR. REDD: I'll mark it as Exhibit 33.

16 THE COURT: 33.

17 (Exhibit 33 was marked for identification.)

18 MR. REDD: Page 28 of Mr. Heggen's deposition he was
19 asked on lines --

20 THE COURT: -- first of all, any objection to this being
21 received.

22 MR. REDD: Oh, sorry.

23 MS. SCHMIDT: Oh, none.

24 THE COURT: Thank you. 33 is received.

25 (Exhibit 33 was admitted into evidence.)

1 MR. REDD: Thank you. 20, page 28, lines three through
2 nineteen addresses the fencing that was, the flooding
3 experience in 2019, Bruce Heggen says we repaired a lot of
4 fence. Question, do you recall where the fencing was
5 repaired? Answer, the fencing was repaired along here, along
6 here, we repaired fencing here, here, here. Um, that's where
7 then Bruce marks on Exhibit 2 --

8 THE COURT: -- and that'd be, that'd be Exhibit 2 of his
9 deposition, but, um --

10 MR. REDD: -- 21.

11 THE COURT: It'd be 21 for purposes of this hearing?

12 MR. REDD: Yes.

13 THE COURT: And that's where he, and what you're telling
14 me then is that's the point in time where he marks the dotted
15 lines?

16 MR. REDD: Yes. Yep, and then on line 20 or line 12
17 witness complies with request, that's where we repaired it
18 after the flooding. The flooding, the flooding in September?
19 Yes. How did you go about looking at the fence to determine
20 if it needed to be repaired? I guess if the barbs are down,
21 or the posts were over, or anything like that, hot wires
22 shorted out. He's got the testimony, and he wasn't asked
23 when did you make these repairs. Um, it was rather obvious
24 that there was issues after the flooding event that happened
25 in September. The cattle are still there in October. The

1 repairs were made. The evidence in the record is on the 12th,
2 the fence was in good shape. It was upright. The posts were
3 upright. The electric wire was hot. The barbed wires
4 weren't down, so if the repairs are made by that date, and to
5 the other point, there was no evidence that they weren't
6 made. So, just saying we don't know when they made these
7 repairs. That question of fact, no, the record shows it
8 wasn't, he wasn't asked, and that by the time this accident
9 happened any fences that were down were fixed and barbed
10 wires were down or fixed. Any hot wires were down were
11 fixed. That was all in good shape when he checked, when he
12 inspected it.

13 So, to infer that that's wrong or that the fence was
14 actually in bad shape on the day of the accident is not based
15 off of anything, it's based off of a theory that flooding
16 could cause some damage to the fencing. So, maybe there was
17 still damage, but, again, that's speculative at its heart.
18 There's a reference to Exhibit 32 which was admitted today to
19 try to, I guess, create some questions about the testimony of
20 Mr. Heggen. Exhibit 32, beginning of this document, the
21 questioning has to do with camping out at the, at the
22 pasture. They camp there in the summertime. Um, and then it
23 continues, and Bruce testifies that he keeps the cattle, the
24 calves in the home section or at the, he identifies Exhibit
25 14, which is his Exhibit 1. He circled where he keeps the

1 calves at home, and then he identified towards the end of his
2 exhibit that he keeps the remaining cows are turned out to
3 pastures two, five, six, and seven, which if you look at
4 Exhibit 14, deposition Exhibit 1, those are all the pastures
5 or all the fields in the home section, which is in his
6 affidavit where he says he keeps the cattle during the winter
7 time. So, there's no incongruity between his testimony.
8 It's at the very least, at the very most a clarification, but
9 it is very much consistent with what he said in his
10 affidavit.

11 And, lastly, the plaintiff said, well, there's all these
12 fields they could have put cows. They could put them
13 anywhere. He's got crops in most of these. No one's
14 testified that there was room for them, and no one testified
15 that they needed to be moved at the time of the accident.
16 Again, they -- plaintiff's counsel comes up with the theory
17 doesn't mean it's evidence. The Ghobey [spelled
18 phonetically] case clearly provides you have to have evidence
19 to substantiate your case. You can't make the educated
20 guesses. You do have to take speculative leaps to reach
21 conclusions. How you can't present evidence. You can't
22 avoid summary judgment and summary judgment must be granted
23 in that case. Um, so ultimately we've got no evidence
24 presented by the plaintiff that the property was in a state
25 of disrepair in October. Nothing. Um, it rained the month

1 before, that's all they've got. They've got, um, we've -- in
2 contrast, we've got direct evidence that it was in good
3 shape. Everything was up. It was operational as intended.
4 It was operational as intended. Dr. Little even testified
5 that it's in proper acceptable within the standard for a
6 South Dakota farmer in this area on this highway. Ah, we've
7 got no waste. No prior experience of pasture -- of cattle
8 getting out of this property, um, not since the upgrades were
9 made in 2010. We've got one cow escaping instead of, you
10 know, hundreds, or hundred, or ten, or five. Um, it's an
11 isolated instance. It happened due to a number of reasons
12 and, um, at one more point, at, um, oh, fences. Gates.
13 There's no evidence that gates were left open. Um, and to
14 your credit and to what you raised, I mean, if someone comes
15 on my property and opens my gate or cuts my fence, that's not
16 the landowner's responsibility or obligation. That doesn't
17 create a duty for him (unintelligible) he gets to stand
18 outside, and you know, watch, take guard all night. He's on
19 a busy highway. You know that stuff happens. But one,
20 there's no evidence that it happened in this case. Plaintiff
21 was there all night or for a half hour that night there was
22 no gate she saw open. She -- if there was a gate open
23 presumably more cattle would have gotten out, not just one.
24 But we don't have any gates open. There's no evidence gates
25 were left open. Um, we also have, um, you know, no evidence

1 that, that, so I guess, strike that. This is the claim what
2 gates could have been left open? We're back to speculating.
3 This could have happened, that could have happened. Where's
4 your evidence? Where is the evidence? There's none. Um, and
5 so I would agree with your contention about the negligence
6 per se. I interpret the statutes to impose and allow the
7 animal control officers to seize the animals. I don't
8 believe that any statute that's or any ordinance that's have
9 been cited by plaintiff is applicable. There is no statute
10 that implies an obligation on the landowner. The legislature
11 addressed trespassing and impose strict liability in a very
12 specific instance. It's outlined in the statute. There's
13 nothing indicated in this case that there's any policy or
14 indication to deviate from that statutory standard. Um, res
15 ipsa is not applicable. There's case law we've cited that
16 says it's not applicable.

17 So, at the end of the day, they've got no evidence, um,
18 that the theory of their case, strike that. The theory of
19 their case isn't supported by any evidence. They haven't put
20 forth a single document. Um, they had all the opportunity in
21 the world. If there was really a problem with this fencing,
22 and that it was in the conditions alleged, presumably, there
23 would have been problems. They'd have had cattle out all the
24 time. There's not. One cow gets out one time in an isolated
25 incidence isn't grounds alone to establish negligence. The

1 facts of this case make it distinguishable from the
2 (unintelligible) case. The *Zeeb* case. The *Adkins* case.
3 They're all extinguishable and it lines up exactly with the
4 other cases that I cited, the *Walborn* and the *Lockline* case,
5 which I believe were good analysis provided by both
6 (unintelligible) and what they would apply in this scenario
7 based off of these facts and the status of the record at this
8 point in time.

9 And so for those reasons, the defendants would request
10 that this case be dismissed.

11 THE COURT: Ms. Schmidt.

12 MS. SCHMIDT: This was collaterally addressed in the
13 briefs. Just ask that the court review in camera the
14 materials that defendants are withholding, photographs, and
15 statement in the claims file that was being requested that we
16 now understand now that there's (inaudible, not by a mic)
17 that there's no evidence. I believe that we have a
18 substantial need for the photographs and the statement from
19 Mr. Bruce Heggen to be able to rebut the fact that they claim
20 there's no evidence.

21 THE COURT: Anything else? Response?

22 MR. REDD: To my knowledge, there's not a statement to
23 provide, and as I've already addressed in our briefing, all
24 photographs that we have from 2019 requested in discovery,
25 they've all been produced.

1 THE COURT: And I'm not here to set -- I'm not here to
2 settle the discovery dispute today. So, I'll consider the
3 record, record that's before me. Certainly as I understand
4 it, there could have been a motion made in terms of
5 compelling, and then the court or compelling discovery and
6 then the court could have made a determination as to the
7 appropriateness, therefore, once the meet and confer
8 requirement would have been met, so.

9 MS. SCHMIDT: Did confer. We just didn't have
10 substantial need until the motion was filed and the position
11 was taken that there's no evidence.

12 THE COURT: All right. Well, you've made your record,
13 I've made my ruling. So, um, any other argument that either
14 one of you wish to submit?

15 MR. REDD: No, sir.

16 THE COURT: Okay. Um, been some points that both of you
17 have made in your arguments, and I think I've, I've clearly
18 indicated I wanted to look at, at those a little, a little
19 closer, including the, the additional references, or the
20 additional exhibits as referenced by the attorneys. I
21 understand, and I, I did look at I think you've had either
22 two or three different scheduling orders in this file, but I
23 looked at the most current one, and also noting Mr. Redd's
24 discussion in the e-mail about April 5th being another, or
25 should I say the next significant deadline relative to expert

1 discovery, and both parties having to spend more money and
2 resources on this. And so I will at least provide the
3 parties an understanding of what my decision's going to be by
4 next week. Okay. Ah, that way you know where it's going and
5 I may need a little more time, ah, to provide you something
6 further, but it -- I at least want to be able to in keeping
7 in mind where the scheduling order is, and I at least want to
8 provide you at least a semblance of what the ruling's gonna
9 be on this so you can plan your schedules accordingly.

10 Any questions of the court?

11 MS. SCHMIDT: Not from plaintiff.

12 MR. REDD: I will note just for the clarity, this
13 upcoming up deadline has to do with causation of damages.
14 There's no impact on the pending motion as it relates to
15 liability.

16 THE COURT: No, I understand that. I just thought it
17 was you know, potentially additional discovery, and the
18 parties expending additional resources.

19 MR. REDD: Yeah, that was the concern I raised.

20 THE COURT: That's all I was getting at. That's, that's
21 how I interpreted your concern and obviously, if, if that
22 continues you -- both sides are expending additional
23 resources and so forth.

24 So, I just, all I was saying was is that I tried to get
25 you an understanding of where I'm at in terms of a ruling, so

1 you know where to go with that.

2 MR. REDD: I think we're on the same page. I just
3 wanted the record to reflect in the event there was an issue
4 later someone said, hey, there's still a deadline that we
5 still could do X discovery that could have been relevant.
6 That's not what's going on here.

7 THE COURT: Okay.

8 MR. REDD: So, okay.

9 THE COURT: Anything else? Thank you very much. I
10 appreciate both of you. Your arguments and your extensive
11 briefing and record on this certainly provided me plenty to
12 review. So, thank you both of you.

13 MR. REDD: Thank you.

14 THE COURT: We're in recess.

15 (Proceedings concluded at 12:41 p.m.)

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

CERTIFICATE

This is to certify that I, Roxane Osborn, Court Recorder and Notary Public, do hereby certify and affirm that I transcribed the proceedings of the foregoing case, and the foregoing pages 1 - 70, inclusive, are a true and correct transcription from CourtSmart.

Dated at Sioux Falls, South Dakota, this 19th day of September, 2024.

/s/ 

Roxane R. Osborn
Court Recorder

Notary Public - South Dakota
My commission expires: May 9, 2030

Ordinance MC 52 -17

AN ORDINANCE ENACTING THE 2017 MINNEHAHA COUNTY REVISED ANIMAL CONTROL ORDINANCE, AND FOR THE REPEAL OF THE 2002 MINNEHAHA COUNTY ANIMAL CONTROL ORDINANCE AND ANY OTHER RESOLUTIONS, RULES AND REGULATIONS IN CONFLICT HEREWITH.

WHEREAS, the Minnehaha County, South Dakota, Board of County Commissioners finds it necessary to regulate the ownership and possession of animals in order to protect and promote the public health, safety and welfare for the residents and animals in the unincorporated areas of Minnehaha County;

WHEREAS, pursuant to SDCL Ch 40-34, the County may enact ordinances to establish an animal control program and related powers within the County; and

WHEREAS, SDCL § 7-18A-2 provides counties with authority to enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers granted to it by law and provide for the enforcement of violations of such ordinances; and

WHEREAS, these regulations shall be in full force and effect from and after its passage and publication as provided by law, and

WHEREAS, these regulations shall repeal and replace the 2002 Minnehaha County Animal Control Ordinance, and

WHEREAS, the Board of County Commissioners conducted a public hearing on October 24, 2017 commencing at 9:00 a.m. or as soon thereafter as may be heard.

NOW THEREFORE BE IT ORDAINED by the Board of County Commissioners that the 2002 Minnehaha County Animal Control Ordinance is hereby repealed in its entirety; and

BE IT FURTHER ORDAINED by the Board of County Commissioners that the 2017 Minnehaha County Revised Animal Control Ordinance is hereby adopted and shall become effective upon the passage and publication thereof and effective on the twentieth day after its completed publication or notice of adoption pursuant to SDCL § 7-18A-5, and placed on file with the County Auditor, unless suspended pursuant to law.

ARTICLE I. GENERAL PROVISIONS AND DEFINITIONS

1.01 TITLE. This ordinance shall be known as the "2017 Minnehaha County Revised Animal Control Ordinance".

1.02 INTENT. These regulations are enacted for the purpose of regulating the ownership and possession of animals in order to protect and promote the public health, safety and welfare for the residents and animals of the unincorporated areas of Minnehaha County.

1.03 Effective Date. These regulations shall be in full force and effect from and after its passage and publication as provided by law.

1.04 SAVING CLAUSE. These regulations shall in no manner affect pending actions either civil or criminal, founded on or growing out of any regulations hereby repealed. These regulations shall in no manner affect rights or causes of action, either civil or criminal, not in suit that may have already accrued or grown out of any regulations repealed.

1.05 SEVERABILITY. Should any provision of this ordinance be declared invalid for any reason, such decision shall not affect the validity of the ordinance as a whole, or any portion thereof.

1.06 DEFINITIONS. The following words, terms, and phrases, when used in this ordinance shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

Abandonment. To intentionally desert or to relinquish the supervision or care of an animal.

Alter. To render an animal permanently sterile and incapable of reproduction.

Animal. Any mammal, bird, reptile, amphibian or fish, except humans.

Animal Control Facility or Shelter. A building, property or facilities approved by the County Commission for the impounding of animals.

Animal Control Officer. An individual or organization employed or appointed by the Board of County Commissioners to enforce the ordinance.

Board of County Commissioners. The governing body of Minnehaha County.

Bodily Injury. Any physical injury to a human being caused by an animal, including but not limited to injuries wherein the skin is broken, interior or exterior bleeding or bruising occurs, or bone tissue or muscle damage is suffered.

Commercial Kennel. Commercial kennel refers to kennel services for dogs, cats and similar animals. Typical uses include commercial animal breeding with four (4) or more animals, boarding kennels or pet motels.

Enclosed Lot. Any parcel of land or portion thereof in private ownership, around the perimeter of which a wall or fence has been erected of such a height and surety so as to retain the species of animal within the bounds for which the fence was erected.

Exotic Animal. Any animal which is ordinarily found in an unconfined state and is usually not kept as a household pet, including, but not limited to: lions, tigers, cheetahs, panthers, leopards, cougars, mountain lions, ocelots, alligators, venomous snakes, poisonous tarantulas or other arachnoids, scorpions or poisonous reptilians, any wild members of the genus felis, lynx, bobcats, foxes, minks, skunks, raccoons, bears, non-human primates, wolves and coyotes. "Exotic Animal" shall not include domestic ferrets (*Mustelia furo*), livestock, or household pets as defined herein. Alleged domestication of any exotic animal shall not affect its status under this definition. The determination of exotic animal status for an animal not listed herein will be made by an Animal Control Officer, or its authorized designee.

Household pet. An animal customarily permitted to be kept in a dwelling for company or pleasure, including, but not limited to, dogs, cats, pot-bellied pigs, gerbils, hamsters, tropical fish, or common house birds, provided that such animals are not kept to supplement food supplies or for any commercial purpose. "Household pet" shall not include animals which are the offspring of a household pet and an exotic animal as defined herein.

Impound. The act by an Animal Control Officer, or its authorized designee, of taking up and confining an animal within an animal control facility or shelter.

Leash or Lead. Means a cord, thong, or chain by which an animal is controlled by the person accompanying it.

Livestock and Poultry. Livestock includes but is not limited to horses, mules, cattle, bison, burros, llamas, alpacas, swine, sheep, and goats. Poultry includes, but is not limited to chickens, turkeys, game birds, peafowl and ostriches.

Owner. A person who owns, has, keeps, harbors, or knowingly permits an animal to remain in, on or about his premises.

Premises. A lot, parcel, tract or plot of land together with all buildings and structures thereon.

Provocation. Means the threatening, teasing, or striking of an animal or the threatening of the animal's owner either on or off the animal owner's property.

Residential Development Area. An area of land that is located in a residential zoning district; a residential subarea within a planned development zoning district; or a subdivision of 5 or more lots.

Stray. A "stray" is an animal that is off or away from the premises or at large and not under the control of the owner, possessor, keeper, agent, servant, or a member of his immediate family by a leash or lead.

Seized Animal. A "seized animal" is one that a Court has issued an Order declaring that the Animal Control Officer, Law Enforcement Officer, or their authorized designee may seize and take possession of.

Vicious Animal. A "vicious animal" is one that bites or attempts to bite any person; bites another animal; or in a vicious or terrifying, and terrorizing manner approaches any person in an apparent attitude of attack, whether or not the attack is consummated.

ARTICLE II. RABIES CONTROL AND LICENSING

2.01 RABIES CONTROL - VACCINATION REQUIRED. Every dog, cat or other animal commonly vaccinated for rabies held as a household pet, six (6) months of age or older, is hereby required to be vaccinated against rabies by a licensed veterinarian. It shall be the animal owner's responsibility to secure the required vaccination. Vaccination against rabies shall follow the current rabies compendium set by the State Animal Industry Board.

2.02 KEEPING RABID ANIMALS PROHIBITED. No person shall knowingly harbor or keep any animal infected with rabies or an animal known to have been bitten by an animal known to have been infected with rabies.

2.03 IMPOUNDING FOR OBSERVATION OF RABIES.

(A) When any person owning or harboring a dog, cat or other animal has been notified that the owner's animal has bitten or attacked any person, the owner must within twenty-four (24) hours place the animal under the care and observation of the Animal Control Officer, a licensed veterinarian, or their authorized designee for a period of not less than ten (10) days, except in those cases when an animal has bitten or attacked while on the premises of the owner, and the owner has a current rabies vaccination for the animal, the Animal Control Officer, or its authorized designee may, if the facilities are adequate and if the owner is a responsible person, quarantine the animal on the owner's premises. In this case the owner must sign a statement and understand the responsibility and assume the liability that is involved with the quarantine of an animal that has bitten. The quarantined animal must at all times be available for inspection during the quarantine.

(B) At the end of the ten (10) days observation period, the animal shall be examined by the Animal Control Officer, veterinarian, or their authorized designee and if cleared for release to the owner, may be reclaimed by the owner upon payment by the owner must pay the of all expenses incurred incident thereto, including but not limited to impoundment, board and veterinary costs.

(C) Any animal impounded or placed for observation, showing active signs of rabies, suspected of having rabies or known to have been exposed to rabies, shall be confined under competent observation for such time as may be deemed necessary to determine a diagnosis.

(D) Any animal that has bitten or attacked any person and which cannot be captured may be euthanized in such a manner that the head is not damaged and can be submitted for a rabies examination to a laboratory.

(E) Any animal that has bitten any person may be euthanized by order of the Animal Control Officer or its authorized designee unless proof of a current rabies vaccination effected not less than thirty (30) days prior to the bite is provided within twenty-four (24) hours of the bite. Any animal that has bitten any person may be euthanized by order of the Animal Control Officer, or its authorized designee, if in that person's opinion, based on sound judgment, a greater risk to human life exists in not doing so. In making such a determination, the following factors shall take into consideration:

- (1) The history of the animal including the possibility of its exposure to rabies.
- (2) The vaccination record of the animal.
- (3) The health of the animal.
- (4) The nature, location and seriousness of the bite.
- (5) The circumstances surrounding the bite including whether or not the bite was provoked.
- (6) The tolerance of the person bitten to the vaccines used for treatment.

ARTICLE III. CONTROL OF ANIMALS

3.01 AUTHORITY. The Animal Control Officer, Law Enforcement Officer, or their authorized designee, is hereby authorized and empowered to control, seize or impound any animal found in violation of any provision of this ordinance.

3.02 RUN AT LARGE/STRAY ANIMAL. No animal shall run at large. An animal shall be declared to be running at large or be declared to be a stray animal whenever such animal is off the premises and not under the immediate physical control of its owner, possessor, keeper, agent, servant, or a member of the immediate family thereof. Whenever an animal is declared to be running at large or declared to be a stray animal, the same shall constitute prima facie evidence that the owner permitted it to run at large or be a stray animal, and the Animal Control Officer, Law Enforcement Officer, or their authorized designee may control and impound the animal, and dispose of the animal as set forth in Article V.

3.03 SEIZED ANIMALS. The Animal Control Officer, Law Enforcement Officer, or their authorized designee, may seize an animal through a Court Order, and dispose of the animal as set forth in Article IV.

3.04 VICIOUS ANIMAL.

(A) An animal may be declared to be vicious by an Animal Control Officer, by the attending physician of the victim of an animal bite or scratch, or by a Court of competent jurisdiction, giving consideration the following guidelines:

(1) An animal which, in a vicious or terrifying manner, approaches in apparent attitude of attack, or bites, inflicts injury, assaults or otherwise attacks a person or other animal upon the streets, sidewalks, or any public grounds or places; or

(2) An animal, while on private property, in a vicious or terrifying manner, approaches in apparent attitude of attack, or bites, inflicts injury, or otherwise attacks a mailman, delivery man, or other person, or other animal who is on private property by reason of permission of the owner or occupant of such property or who is on private property by reason of a course of dealing with the owner of such private property.

(3) Any animal of a known propensity, tendency or disposition to attack, to cause injury or to otherwise threaten the safety of human beings or animals.

(4) An animal while at large which, in a vicious or terrifying manner, approaches in apparent attitude of attack, or bites, inflicts injury, assaults or otherwise attacks a person or other animal.

(B) No animal may be declared vicious as set forth herein if the injury or damage is sustained to any person or animal who was committing a willful trespass or other tort upon premises occupied by the owner or keeper of the animal, or who was teasing, tormenting, abusing or assaulting the animal or was committing or attempting to commit a crime.

(C) An animal declared to be vicious shall be taken into custody and impounded by the Animal Control Officer, or its authorized designee. If the animal is running at large it may be captured by the Animal Control Officer, or its authorized designee, or, if it cannot be captured and constitutes a public safety risk, it may be euthanized by the Animal Control Officer, any Law Enforcement Officer, or their authorized designee. If the animal is in the custody of the owner, the Animal Control Officer, or its authorized designee, may either verbally or in writing left at the owner's residence, order the owner to deliver the animal into the custody of the Animal Control Officer, or its authorized designee within twenty-four (24) hours. If the animal is not so timely delivered as ordered, the Animal Control Officer, or its authorized designee, may petition any Magistrate or Circuit Court Judge having authority in Minnehaha County for an Order authorizing the Animal Control Officer, or its authorized designee to enter on to the owner's premises and take custody of the animal.

(D) Absent a risk to public safety as set forth in 3.04(C) above, or risk to the health, welfare and safety of the Animal Control Officer, Law Enforcement Officer, or their authorized designee, an animal that is declared vicious, once in the custody of the Animal Control Officer, shall be held pending a final determination regarding the disposition of the animal. If the Animal Control Officer and Owner cannot agree on the

disposition of the animal, the Animal Control Officer shall request that the State's Attorney's Office commence proceedings to summons the owner into court and show cause why the animal should not be euthanized. The owner shall bear all costs associated with the impoundment, including but not limited to impoundment, board and veterinary costs of the animal during the period of impoundment.

(E) An animal declared vicious, which is running at large with no proof of ownership and for which no ownership can be immediately established, shall be deemed an abandoned vicious animal and may be euthanized by the Animal Control Officer without prior judicial approval.

3.05 The Animal Control Facility or Shelter, Animal Control Officer, Law Enforcement Officer, or their authorized designee, may serve written notice upon the owner of a dog or cat known to have been bitten by an animal known or suspected of being affected by rabies, requiring the owner to confine such dog or cat for a period of not less than six months. However, if such dog or cat had been properly treated with an antirabic vaccine, confinement shall be for a period of not less than three months. In the case of any pet other than a dog or cat, the department may serve written notice upon the owner of such animal that the owner shall have the animal euthanized immediately.

3.06 RECORD OF BITES. The Animal Control Officer, or its authorized designee, shall keep an accurate record of all animal bites.

3.07 RESIDENTIAL DEVELOPMENT AREA - FURTHER LIMITATIONS. The following limitations shall apply in a Residential Development Area:

(A) It is unlawful for any person to have or to keep more than a combined total of four (4) dogs (*Canis lupus familiaris*), cats (*Felis silvestris*) or potbellied pigs over the age of six months.

(B) Disturbing the Peace. The owner or custodian of an animal located within a residential development area shall not allow the animal to create a frequent, habitual or continued disturbance by making loud noises so as to be a nuisance to a neighbor or neighbors at any time of the night or day. A nuisance shall constitute an ongoing problem over several days and at several intervals throughout a 24 hour period for any length of time. The Animal Control Officer, or its authorized designee, shall have the authority to use all reasonable means to abate such nuisance, including but not limited to requiring that the owner make bona fide efforts to quiet his animal and impoundment of the animal at all times. Upon impoundment of an animal for violation of this Section, the Animal Control Officer, or its authorized designee, shall attempt to locate and notify the absent owner by any reasonable means as readily as possible. No summons and complaint shall be issued nor shall there be a conviction for violation of this Section unless there are at least two (2) complaining witnesses from separate households who shall have signed such complaint. An Animal Control Officer, or its authorized

designee, who has personally investigated the complaint of a single complainant and observed the behavior of the animal complained of, with regard to its frequent, habitual and continued loud noises, may satisfy the requirement for the second complaining witness and may testify to his observations at trial. This section shall not apply to any commercial kennel operating pursuant to a conditional use permit issued by Minnehaha County.

3.08 EXOTIC ANIMALS - PROHIBITED.

(A) No exotic animal as defined by this ordinance may be housed or kept except for those legally within the County at the time of the adoption of this ordinance. Any exotic animals that are housed or kept prior to the effective date of this ordinance must be registered with the Animal Control Officer within ninety days subsequent to the adoption of this ordinance. This provision shall not apply to any circus or exotic animal exhibit or display that is validly and legally operating within the County for a specific and limited time period.

3.09 INJURED ANIMALS.

(A) If an animal is injured and the owner cannot be found, it will be the duty of the Animal Control Officer, or its authorized designee, to determine if that animal for humane reasons, due to the extent of the injury and the suffering, shall be humanely euthanized. The County and Animal Control Officer shall not be held liable in any way for this humane act. Any such euthanasia shall take place as set forth in SDCL 40-1-13.

3.10 UNATTENDED ANIMALS IN STANDING OR PARKED VEHICLES.

No owner or caretaker may leave a dog, cat, or other small animal unattended in a standing or parked vehicle in a manner that endangers the health or safety of such animal. Reasonable force may be used to remove such animal by any Animal Control Officer, Law Enforcement Officer, or their authorized designee, without civil or criminal liability for any damage caused by removing such animal from a vehicle.

ARTICLE IV. RECLAMATION & DISPOSITION OF SEIZED ANIMALS

4.01 Except as provided herein, in cases where an animal has been seized by the Animal Control Officer, Law Enforcement Officer, or their authorized designee, such animal may be reclaimed by the existing owner, adopted to another owner, or humanely euthanized thereby extinguishing all property rights of the existing owner following the procedures as hereinafter provided:

(A) Upon seizure of an animal, the Law Enforcement Officer, Animal Control Officer, or their authorized designee shall attempt to contact the existing owner and provide verbal notice to the owner that the animal may be reclaimed as provided herein. If verbal notice is unsuccessful, then the Law Enforcement Officer, Animal Control Officer, or their authorized designee, shall then serve

written notice upon the existing owner of the seizure of the animal and of the owner's opportunity to redeem the animal as follows:

- (1) If the identity of the existing owner is known, by posting a copy of the written notice on the owner's last known residential property and by mailing a copy of the notice to the owner's last known residential property; or
- (2) If the identity of the existing owner is not known, by leaving a copy of the written notice posted on the property where the animal was seized.

The written notice shall identify as best able to the animal species, color and age and shall state the owner has seven (7) business days to contact the Law Enforcement Officer or Animal Control Officer or the animal will be placed for adoption or humanely euthanized.

(B) The existing owner shall have seven (7) business days from the date the owner was provided verbal notice or the date the written notice was mailed or posted to:

- (1). Declare in writing and deliver to the Animal Control Officer or its authorized designee keeping said animal—
 - (a) Acknowledgement by the existing owner of the owner's intent to maintain ownership of the animal and to object to the adoption or euthanasia of the animal; and
 - (b) Acknowledgement by the existing owner of the obligation to pay when due all impoundment, board, veterinary, and any other incurred costs until such time as the animal is released to said existing owner, and that failure to comply may result in the animal being adopted or euthanized.
- (2) Pay to the animal control shelter all impoundment, board, veterinary and any other incurred costs.

(C) Upon acknowledgement of the existing owner of the intent to maintain ownership of the animal and the objection to the adoption or euthanasia of the animal, the existing owner shall pay to the animal control shelter all impoundment, board, veterinary and any other incurred costs prior to release of the animal to the existing owner.

4.02. If the existing owner of the animal fails within the 7 day period to declare the hereinbefore stated acknowledgement or fails within 10 days of delivery of the notice as provided in § 4.01(a) (1) or (2) to make full payment and redeem the animal, then ownership of the animal will be transferred to the Animal Control Facility or Shelter, Animal Control Officer or their authorized designee and the animal may be adopted or be humanely euthanized.

ARTICLE V. RECLAMATION & DISPOSITION OF ANIMALS RUNNING AT LARGE/STRAYS

5.01 For any animal impounded having been declared to be running at large or a stray, the Animal Control Officer, Law Enforcement Officer, or their authorized designee will make an attempt to contact the owner where the animal has identification. Following impoundment, animals having identification will be held for 5 days and animals having no identification will be held for 3 days. If the owner has not reclaimed the animal within this time period, the Animal Control Officer or its authorized designee may adopt out the animal or have it humanely euthanized.

5.02. Before any owner may redeem an animal impounded under the provisions of this ordinance, all impoundment, board, veterinary and any other costs incurred by the County, Animal Control Facility or Shelter, Animal Control Officer, Law Enforcement Officer or their authorized designee in impounding such animal shall be paid.

ARTICLE VI. COMMERCIAL KENNELS

6.01 REQUIREMENTS.

(A) Commercial kennels shall be constructed to the standards of the Animal Welfare Act- Part 3, Sub-part A, Sections 3.1-3.12.

ARTICLE VII. ENFORCEMENT

7.01 ENFORCEMENT OF ORDINANCE. It shall be the duty of the Animal Control Officer, Law Enforcement Officer, or their authorized designee to carry out and enforce all the provisions of this ordinance, including but not limited to issuing a citation for an ordinance violation to any owner or person possessing or having control over an animal. No person shall hinder, delay or obstruct the Animal Control Officer, Law Enforcement

Officer, or their authorized designee such person is engaged in performance of an official duty.

ARTICLE VIII. SANCTIONS

8.01 CLASS 2 MISDEMEANORS. Violations of this County Ordinance shall be deemed Class 2 Misdemeanors.

Adopted this 14 day of November, 2017.

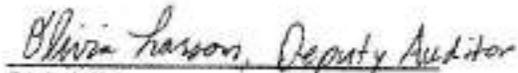
Effective: 12/19/2017

MINNEHAHA COUNTY BOARD OF COUNTY COMMISSIONERS



Gerald Beninga, Chairman
Minnehaha County Board of County Commissioners

ATTEST:



Bob Litz
County Auditor

First Reading	October 31, 2017
Publication of Notice of Hearing	November 6 & 8, 2017
Public Hearing	November 14, 2017
Notice of Adoption	November 20 & 22, 27 & 29, 2017
Effective Date	December 19, 2017

FACT OF ADOPTION

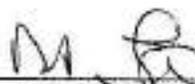
An ordinance Enacting the 2017 Minnehaha County Revised Animal Control Ordinance, and for the Repeal of the 2002 Minnehaha County Animal Control Ordinance (MC29-02) and Any Other Resolutions, Rules and Regulations in Conflict Herewith.

The Minnehaha County Board of Commissioners adopted Ordinance MC52-17 on November 14, 2017. This ordinance repeals the 2002 Minnehaha County Animal Control Ordinance (MC29-02) and adopts the 2017 Minnehaha County Revised Animal Control Ordinance.

The entire ordinance is on file in the office of the County Auditor and available for inspection during regular business hours.

Published once at the total approximate cost of \$____.

This revised ordinance shall take effect on the twentieth day after its completed publication, to wit: December 19th, 2017.



Bob Litz, County Auditor

PUBLISH:

Argus Leader: November 20, 2017 & November 27, 2017

Brandon Valley Challenger: November 22, 2017 & November 29, 2017

Dell Rapids Tribune: November 22, 2017 & November 29, 2017

ORDINANCE MC46-14

AN ORDINANCE PROVIDING FOR THE REMOVAL OF OBSTRUCTIONS FROM MINNEHAHA COUNTY HIGHWAY RIGHT-OF-WAYS AND PROHIBITING THE PLACEMENT OF SNOW FROM PRIVATE DRIVEWAYS ONTO MINNEHAHA COUNTY HIGHWAY RIGHT-OF-WAYS

PURSUANT to SDCL 31-32-3.1, and consistent with the Minnehaha County Highway Department Snow and Ice Removal Policy adopted on December 17, 2013, now

BE IT ORDAINED BY THE MINNEHAHA COUNTY BOARD OF COMMISSIONERS that the authorization to remove obstructions and to prohibit the placement of snow from private driveways onto Minnehaha County Highway right-of-ways is hereby enacted.

Section 1:

ILLEGAL OBSTRUCTIONS: Obstructions within the road right-of-way including, but not limited to, hay bales, vehicles, or fences intentionally placed into or unintentionally left on the road right-of-way shall be removed by the owners of such materials or person responsible for placing such materials in the road right-of-way. Unless the person responsible for such obstruction uses diligence to notify the public and applicable authority of any such material being intentionally placed or unintentionally left on the road right-of-way and immediately puts up a danger sign, that person is guilty of a petty offense under SDCL 31-32-6.

Section 2:

ADDITIONAL DUTIES, PROHIBITIONS, AND REMEDIES: Along with and in addition to the penalties authorized by SDCL Chapter 31-32 and Section 1 of this Ordinance, the following also apply:

1. Hay bales shall be removed from all Minnehaha County highway rights-of-way before November 1 of each year.

- Thereafter, that the County may remove the bales and the adjacent landowner shall be civilly liable, and accordingly billed, for the cost of removal.
2. Vehicles shall not be parked on the roadway surface or shoulder, and if a vehicle is parked on a personal driveway, it shall be outside of the right-of-way. Any such vehicles, parked or stalled on the highway surface or road right-of-way, shall be removed within 48 hours, unless the vehicle presents a danger to other vehicles on the highway, in which case the vehicle must be immediately removed, and all provisions of Section 1 of this ordinance shall be complied with. The owner or driver of the vehicle that is stalled or intentionally placed on the highway surface or in the road right-of-way shall immediately notify the 9-1-1 of such vehicle. If such vehicle is not removed within 48 hours or such vehicle presents a dangerous condition to other vehicles on the highway, the County has the authority to remove and store the vehicle elsewhere and the owner of such vehicle shall be civilly liable, and accordingly billed, for any expenses incurred by the County in removing and storing the vehicle.
 3. The placing snow from a private driveway onto a Minnehaha County Highway public roads and right-of-way is prohibited. Property owners found in violation of this section will be given notice and shall remove the snow. If the snow is not removed within 48 hours of notification, the County may remove the snow and the property owner shall be civilly liable and accordingly may be billed for such expenses caused by removal of the snow.
 4. Any other material or cargo left in violation of SDCL Chapter 31-32 or this ordinance may also be removed by the County, with the responsible owner or actor being civilly liable and accordingly billed for its removal.

Along with any civil penalties imposed by this ordinance, a violation of Section 2 of this ordinance is a Class 1 Misdemeanor pursuant to SDCL 31-32-3.1.

Section 3:

The County shall not be liable for damage to stalled or stranded vehicles on the traveled portion of the roadway or other obstructions that will interfere with snow and ice removal and abrasive placement.

Adopted this 7th day of January, 2014.

BOARD OF COUNTY COMMISSIONERS:

Gerald Benninga

Wally E. Bantz

Cindy Hubing

[Signature]

[Signature]

ATTEST: Bob Litz, Auditor

[Signature]
Deputy Auditor

STATE OF SOUTH DAKOTA)
MINNEHABA COUNTY) ss.
I hereby certify that the foregoing
instrument is a true and correct copy
of the original as the same appears
on record in my office.

JAN 07 2014

BOB LITZ
Minnehaha County Auditor

By [Signature] Deputy

EXHIBIT 28

SNOW AND ICE REMOVAL POLICY

POLICY STATEMENT: It is the policy of the Minnehaha County Highway Department to remove snow from the County roads safely and quickly, and to provide reasonable ice control, while taking into consideration the availability of labor, equipment, and funding.

Our intent is to maintain roads in a passable condition. Snow removal and ice control are not intended to eliminate all hazardous conditions at all times. They are intended to assist vehicles that are properly equipped for winter driving conditions and being operated in a manner consistent with good winter driving habits. It is expected that under normal winter driving conditions, there will be situations when the immediate demand for snow and ice control services will exceed available resources.

Minnehaha County acknowledges that the policies set forth herein are general and that conditions are different in every snow event. Therefore, a departure from this policy may be necessary to protect the safety, health and welfare of the travelling public. This policy does not, nor is it intended to encompass, all details of Minnehaha County's snow and ice removal operations. The policy is to be utilized by employees using their judgment and discretion on how to best carry out its provisions. Employees shall obey applicable traffic laws and regulations while carrying out the policy unless violation is necessary in the employee's judgment and discretion and he/she seeks to minimize any safety risks.

OPERATION HOURS: Normal winter working hours and office hours are Monday thru Friday from 7:30 am to 4:00 pm. Work outside of these hours, such as early morning, evening, and weekends, will be at the discretion of County Highway Superintendent or his designee. Typically during and after a storm, snow removal and sanding operations will be conducted between the hours of 4:00 am and dusk. Exceptions for potential emergencies may be made as determined appropriate by the Highway Superintendent. If you have a medical emergency, contact 9-1-1 immediately.

OPERATIONS IN ADVERSE CONDITIONS: Equipment will not be dispatched when, in the judgment of the Highway Superintendent, low visibility or other conditions are such that the risk to operators and other motorists outweighs the benefits. The general guideline is that equipment will not be dispatched when the estimated visibility in open areas is less than 500 feet. In the event of police, fire or medical emergency, vehicles may be dispatched at the direction of the Highway Superintendent.

ROUTE PRIORITIES: The priority of which roads are plowed and in what sequence may vary, and are weather dependent, but typically go by the following guidelines.

1. Major Collector Routes: These are County major collector routes and are primarily commuter routes.
2. Minor Collector Routes: These roads consist of the remaining paved County roads and gravel County roads.
3. Other County Government Buildings¹: These are parking lots owned by the County (i.e. courthouse, administration building, etc.)

4. **Local Roads¹:** These roads are typically township roads, but can be roads for other public entities such as municipalities.

¹Snow removal at the courthouse and administration building parking lots is typically contracted with private contractors and administered by the Facilities Department Head. The Highway Department will typically send a salt/sander pickup truck to place salt/sand mixtures throughout the parking lots as long as staff is available.

²In the event of an emergency or an extremely high accumulation of snow, other political entities may request the assistance of Minnehaha County. Snow removal work may be performed for other political entities as equipment and labor availability permits, and shall be at the discretion of the Highway Superintendent. Generally that would mean that local entity operators would have to complete the first pass in both directions of assigned routes and County roads should also be clear of any ground drifting that may make the roads impassable before performing any non-County work.

LEVELS OF SERVICE: Minnehaha County does not have a bare pavement policy and roads may not be free of snow or ice. The following are general snow and ice removal considerations:

1. Anti-icing, snow removal, and ice removal may be limited to daylight hours.
2. Depending upon current and forecasted weather conditions, snow and ice will be removed as best as practical.
3. Special consideration may be given to critical intersections, hills, curves and other hazardous areas.

RURAL MAILBOXES: Minnehaha County will repair or replace mailboxes destroyed by County forces during snow fighting operations. The repair or replacement to mailboxes will be performed by Minnehaha County Highway Department personnel. Existing mailboxes or posts will be reused if undamaged, however, if the existing mailbox or post is significantly damaged, a new mailbox or post will be installed. If a mailbox or post is replaced, the box will be a standard metal box and the post will be a standard breakaway post, meeting Federal Highway Standards. If a mailbox post cannot be replaced do to frozen ground, a temporary mailbox will be used until Spring.

OBSTRUCTIONS: Obstructions within the road right-of-way such as hay bales, vehicles, or fences which might cause drifting are hereby prohibited pursuant to SDCI 31-32-3.1 and duly enacted ordinances of Minnehaha County and shall be removed by the owners.

1. Hay bales need to be removed from the road right-of-way before November 1st, and after that time the County may remove the bales at the adjacent landowner's expense.
2. The County shall not be liable for damage to stalled or stranded vehicles on the traveled portion of the roadway or other obstructions which will interfere with snow and ice removal and abrasive placement. The owners of stalled or stranded vehicles should immediately notify 9-1-1. A stalled or stranded vehicle blocking the road needs to be moved as soon as possible, or the vehicle may be towed at the owner's expense.
3. Vehicles shall also not be parked on the roadway surface or shoulder, and if a vehicle is parked on a personal driveway, it should be outside of the right-of-way.

PRIVATE ROADS: The County will not operate snow removal equipment on private roads. Normal County removal operations may result in snow or ice being deposited in driveways adjacent to public

roads. The County will try to limit the amount of snow placed in private drives but when the snow on the roadway is heavy, the amount of snow left in a driveway may be heavy.

An exception to this policy will only occur under the direction from law enforcement or medical response teams to clear private roads or driveways.

SNOW PLACED ON ROADWAY: County residents are to avoid adding to the hazards of wintertime driving by not placing snow from their driveway onto public roads and right-of-way. South Dakota Codified Law 31-32-3.1 prohibits obstructing or causing to be obstructed any public highway or right-of-way and violation is a class 1 misdemeanor. Piles of snow left on or near the road can freeze into a solid mass creating a hazardous situation for vehicles and snowplows. Accidents and damages caused by snow piles placed in the roadway may result in liability to the property owner. Piles of snow increase the chances of drifting snow onto the roadway. Property owners found in violation will be given notice and shall remove the snow. If the snow is not removed within 48 hours after notification, the County will remove the snow and the property owner will be billed.

Adopted by the Commission on December 17, 2013.

Revisions adopted by the Commission on November 15, 2016.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30773

AMBER ELIZABETH FRERK,

Plaintiff/Appellant,

vs.

LEO DEAN HEGGEN, JOANNE B. HEGGEN, AND BRUCE HEGGEN,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, Presiding Judge

BRIEF OF APPELLEES

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Notice of Appeal filed July 24, 2024

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PRELIMINARY STATEMENT

Citations to the Certified Record are “R.” followed by the applicable page number(s) in the Clerk’s Index. References to Appellant’s Brief are “Appellant’s Brief,” to Appellant’s Appendix are “App.,” and to Appellees’ Appendix are “Heggen App.” followed by the applicable page number(s). Defendants will be referred to collectively as the “Heggens.”

JURISDICTIONAL STATEMENT

Plaintiff appeals from the Memorandum Decision and Order, dated June 25, 2024, granting summary judgment in favor of the Heggens in the Second Judicial Circuit, Minnehaha County. R.737-752, App.1-16. Notice of Entry of the Order granting Defendants’ Motion for Summary Judgment was filed and served on June 25, 2024. R.753-770. Plaintiff filed a Notice of Appeal of the Order on July 24, 2024. R.771-773.

Plaintiff’s Notice of Appeal was timely; however, Plaintiff has not satisfied the jurisdictional requirements to perfect her appeal, as she has not filed a bond for costs on appeal as required by SDCL 15-26A-23. SDCL 15-26A-23 states in relevant part:

a bond for costs on appeal or equivalent security *shall be filed* by the appellant with the clerk of the circuit court within the time provided by § 15-26A-6; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of five hundred dollars.

(emphasis added). As this Court has stated, “SDCL 15-26A-23 *requires* appellants to file a bond to cover cost of appeal” *First Nat’l Bank of Black Hills v. Treadway*, 339 N.W.2d 119, 121 (S.D. 1983) (emphasis added).

Under the plain language of the statute, Plaintiff had 30 days from the notice of entry of the order, until July 24, 2024, to file a bond for cost. Plaintiff has not filed a

bond for cost and is not excused from the requirement. Plaintiff's failure and/or untimely filing of a cost bond deprives this Court of jurisdiction, and this appeal should be dismissed on this basis.

Absent Plaintiff's failure to pay the required bond, this Court would have jurisdiction to consider Plaintiff's appeal of the circuit court's Order, pursuant to SDCL 15-26A-3(1).

REQUEST FOR ORAL ARGUMENT

The Heggens respectfully request oral argument.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in granting summary judgment in favor of the Heggens on Plaintiff's negligence claim.

Plaintiff commenced an action for negligence and negligence per se against the Heggens after one of Bruce Heggen's cows was struck by Plaintiff's vehicle on Highway 11. R.2-6. Plaintiff's negligence claim alleged the cow escaped its enclosure because the Heggens failed to properly maintain the fencing that enclosed the pasture where the cow was grazing. R.5. The circuit court correctly found no issue of material fact existed because Plaintiff failed to present evidence that: (1) the fence was in disrepair at the time the cow escaped; (2) the cow escaped due to the negligence of the Heggens; or (3) the Heggens could have reasonably anticipated the cow would escape. R.743-748, App.7-12. The circuit court entered a Memorandum Decision and Order granting the Heggens' Motion for Summary Judgment on June 24, 2024. R.737-752, App.1-16.

- *Godbe v. City of Rapid City*, 2022 S.D. 1, 969 N.W.2d 208
- *Casillas v. Schubauer*, 2006 S.D. 42, 714 N.W.2d 84
- *Walborn v. Stockman*, 706 P.2d 465 (Kan. Ct. App. 1985)
- *Lockling v. Ammon*, No. A-01-208, 2002 WL 1475867 (Neb. Ct. App. Jul. 9, 2002)

2. Whether the Circuit Court erred in granting summary judgment in favor of the Heggens on Plaintiff's negligence per se claim.

Plaintiff's Complaint also sought to impose liability on the Heggens under a negligence per se theory. R.6. Plaintiff alleged two Minnehaha County Ordinances, Section 3.02 of Ordinance 52-17 and Ordinance 46-14, created a duty of care and that the Heggens breached such duty as a matter of law because Bruce Heggen's cow was on Highway 11. R.6. The circuit court properly held that neither ordinance established a

standard of care, created a protected class of persons, nor contemplated injuries to a protected class of persons. R.748-751, App.12-15. As such, the circuit court ruled that Plaintiff's negligence per se claim failed as a matter of law. R.751, App.15. The court's June 24, 2024, Memorandum Decision and Order granted the Heggens' Motion for Summary Judgment on Plaintiff's negligence per se claim. R.751, App.15.

- *Davies v. GPHC, LLC*, 2022 S.D. 55, 980 N.W.2d 251
- *Sork v. Taylor Bros., Inc.*, 277 N.E.2d 5 (Ind. Ct. App. 1971)
- *Cooper v. Eberly*, 508 P.2d 943 (Kan. 1973)
- SDCL Ch. 40-28

STATEMENT OF THE CASE

Plaintiff commenced this action against Bruce Heggen, Leo Heggen, and Joann Heggen in September 2022. R.2-7. Plaintiff's Complaint alleges claims for (1) negligence and (2) negligence per se against the Heggens in connection with the escape of the cow that Plaintiff struck with her automobile on the evening of October 12, 2019. R.2-7. Plaintiff alleges the cow escaped because the Heggens "failed to adequately maintain the fencing or other elements of livestock confinement" and "failed to ensure that fencing or other confinement gates were securely closed before the subject collision." R.5. Plaintiff also alleged that the Heggens violated Section 3.02 of Minnehaha County Ordinance 52-17 and Minnehaha County Ordinance 46-14, which constituted negligence as a matter of law. R.6.

On February 16, 2024, the Heggens filed a Motion for Summary Judgment. R.318. On March 26, 2024, a hearing was held before the Honorable Douglas P. Barnett on the Heggens' Motion for Summary Judgment. R.418. On June 25, 2024, the circuit court issued a Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment. R.737-752, App.1-16.

The circuit court held that Plaintiff failed to provide evidence that the fence was in poor shape or disrepair on the night of the accident and failed to present any evidence to establish that the cow escaped due to the negligence of the Heggens. R.746-748, App.10-12. Because there was no dispute that the fencing material was proper and in working order on the evening of the incident and there were not any prior instances of cattle escaping the enclosure since the fencing was upgraded, the court held that the Heggens could not have reasonably foreseen that the cow would escape. R.747-748,

App.11-12. The circuit court rejected Plaintiff's negligence per se claim, holding that neither Section 3.02 of Ordinance 52-17 nor Ordinance 46-14 established a standard of care, created a protected class of persons, nor contemplated injuries to the protected class of persons. R.749-751, App.13-15.

STATEMENT OF FACTS

The following facts are undisputed:

1. The pasture at issue is enclosed by a 5-strand barbed wire fence and a high-tensile electric wire, set back 18-inches from the fence posts. R.340, App.19 (SUMF ¶ 17); R.412, Heggen App.2 (Bruce Aff. ¶ 8).
2. The high-tensile electric wire was added in 2010, after an incident where a cow escaped the Pasture. R.343, App.22 (SUMF ¶ 43).
3. After upgrading the fence in 2010 and prior to October 12, 2019, the Heggens did not have any cattle escape the perimeter fencing of the Pasture or access the Highway. R.343, App.22 (SUMF ¶ 44); R.415, Heggen App.5 (Bruce Aff. ¶ 18).
4. The type of fence and fencing materials used by the Heggens to enclose the Pasture on October 12, 2019, are proper for this location. R.344, App.23 (SUMF ¶ 50).
5. The perimeter fence of the Pasture was in place and in working order on the evening of October 12, 2019. R.341, App.20 (SUMF ¶¶ 26-28).
6. Defendant Bruce Heggen inspected the fencing on October 12, 2019, including prior to dark, and confirmed the same was in place, working as intended, and that all cattle were restrained. R.341, App.20 (SUMF ¶ 27).
7. On the evening of the day of the accident, within an hour of sunset, Plaintiff and her passenger drove by the Pasture and did not notice any issues with the fencing or see any cattle outside of the enclosure. R.338, 341, App.17, 20 (SUMF ¶ 2; 27-28).
8. One cow escaped from the Pasture after dark on October 12, 2019. R.342, App.21 (SUMF ¶ 31); R.414, Heggen App.4 (Bruce Aff. ¶ 15).
9. The Heggens did not know the cow escaped, nor did they permit the cow to be outside of the enclosure on the night of October 12, 2019. R.341, 343, App.20, 22 (SUMF ¶¶ 29, 39).

10. After the accident, Plaintiff did not see any issue with the fencing, see any other cattle out, nor did she make any determination as to how the cow she struck escaped. R.339, App.18 (SUMF ¶ 7).
11. Plaintiff presented no evidence of the condition of the Pasture or the fence on October 12, 2019. R.339, 344, App.18, 23 (SUMF ¶¶ 7-15, 46-49).
12. Plaintiff presented no evidence of any cattle ever escaping the Pasture due to the fence being in disrepair, nor any evidence that any cows escaped the Pasture after Bruce upgraded the electric fence in 2010. R.860, App.79 (Hr'g Tr. at 35: 18–25).

Additional background facts will be discussed below as necessary for context.

THE PASTURE

Defendants Leo and Joann Heggen own agricultural ground north of Corson, South Dakota. The subject matter of this case concerns one pasture owned by Leo and Joann Heggen (hereinafter, the "Pasture"). R.411, Heggen App.1. The Pasture is located across the street from Bruce Heggen's home. R.411, Heggen App.1. Highway 11 runs through the middle of the Pasture, and the cattle are able to go under a bridge on Highway 11 to access both sides of the Pasture. R.340, App.29. The Heggen family has used the Pasture, and other agricultural land in the area, for over 65 years. R.411, Heggen App.1.

THE ACCIDENT

On October 12, 2019, Plaintiff attended a concert at the Denny Sanford Premier Center in Sioux Falls with her friends. R.338, App.26. On her way to the concert, Plaintiff stopped to pick up one of her friends. R.364-365. Plaintiff then drove south on Highway 11 to get to Interstate 90. R.367-368. Between 6:00 p.m. and 7:00 p.m., Plaintiff and her passenger drove past the area where the accident ultimately occurred. Neither Plaintiff nor her passenger saw any cattle out of the Pasture or noticed any issues with the fencing that enclosed the Pasture. R.338, App.26.

At approximately 11:45 p.m., Plaintiff was driving her friend home after the concert in Sioux Falls. R.338, App.17. As she was driving north on Highway 11, she passed 258th Street and approached the bridge that runs over Split Rock Creek. R.339, App.18. Plaintiff then collided with a cow on the bridge. R.339, App.18.

Plaintiff remained at the scene of the accident for approximately 35 minutes. R.616-617. During this time, Plaintiff took photographs of her car and of the deceased cow; however, she did not see and did not document any issues with the condition of the fence that enclosed the Pasture. R.339, App.18; R.531. Plaintiff does not know where the cow was enclosed before the accident. She does not know where the cow escaped from its enclosure or how it escaped. R.339, App.18. She does not know the time of day the cow escaped, or how long it was out prior to the accident. R.339, App.18. Despite Plaintiff driving by this location approximately every day for the last 18 years, she has never seen a cow outside of the Pasture and is unaware of any other instances of cattle escaping from the Pasture. R.339, App.18; R.371-374 (Pl. Depo. at 28: 11-29: 3; 29: 21-30: 2; 31: 16-20); *see* R.384-385 (Sandstrom Depo. at 26: 20-27: 11) (Plaintiff's friend testified that she routinely drove by the Pasture for six years and never saw a cow outside the Pasture nor was aware of any cow escaping the Pasture).

THE HEGGENS' FARMING AND FENCING PRACTICES

Bruce Heggen has run cattle on the Pasture since 1985. R.411; Heggen App.1. Since 2000, Bruce has owned all of the cattle that grazed in the Pasture. R.411; Heggen App.1. Since at least 2000, Bruce Heggen has utilized a consistent cattle rotation. R.412; Heggen App.2. During the winter months, from approximately November until mid-February, cattle are kept in the field located in the section of land where Bruce Heggen's

home is located. R.412; Heggen App.2. Bruce brings the cattle to the yards at his homeplace in mid-February to calve. R.412; Heggen App.2. The cows and calves stay at the homeplace until May. R.412; Heggen App.2. In late-May or early June, the cattle are moved from the homeplace to the Pasture, where they stay until the end of June or early July, when they are rotated out. R.412; Heggen App.2. The cattle are rotated back into the Pasture at the end of July and remain in the Pasture until the end of October or beginning of November, when the cattle are rotated back to the section where Bruce Heggen's home is located. R.412; Heggen App.2.

Before turning his cattle into the Pasture, Bruce Heggen inspects the fencing to make sure everything is in place and operating as intended. R.412-413; Heggen App.2-3. This includes confirming the posts are in place, the barbed wires are tight, the high-tensile wire is in the correct location, the clips are connected, and the wire is properly electrified. R.412-413; Heggen App.2-3. If any portion of the fence is damaged or out of place, Bruce will make the necessary repairs before releasing the cattle into the Pasture. R.412-413; Heggen App.2-3. Thereafter, while the cattle are in the Pasture, Bruce checks the fencing of the Pasture that is adjacent to Highway 11 every day to make sure it is in place and operating as intended. R.413; Heggen App.3.

PASTURE FENCING SYSTEM

From 2000 through 2010, the Pasture was enclosed with a 5-strand barbed wire fence and electric fence twine that was connected to the fence posts. R.343, App.22; R.415; Heggen App.5. However, in 2010, a cow escaped the perimeter of the Pasture and was struck by a vehicle. R.343, App.22. It was the Heggens' belief that the cow was chased out of the enclosure by a mountain lion, because multiple cows had been killed by

mountain lions and the cow was found on the road with big scratches on its back. R.343, App.22. Notwithstanding, after that incident, in 2010, Bruce Heggen upgraded the fencing by replacing the electric twine with high-tensile electric wire and setting the electric wire back 18-inches from the barbed wire fence. R.343, App.22; R.415. Bruce has used this same fencing system since 2010. R.343, App.22; R.415. Since upgrading the electric fence, until the accident at issue, Bruce Heggen did not have any cattle escape the *perimeter* fencing of the *Pasture*. R.343, App.22; R.415.

Despite Bruce's efforts to ensure the fence was in proper shape over the years, the Heggens have caught people opening gates to the Pasture and one time a state worker backed into one of the gates. R.360. No cattle accessed Highway 11 or were struck by any vehicles on these occasions. R.343, App.22; R.415.

BRUCE'S MAINTENANCE OF THE FENCE IN 2019

In May 2019, Bruce Heggen inspected the 5-strand barbed wire fence and high-tensile wire that enclosed the Pasture. R.340-341, App.19-20. Any component of the fencing that was damaged during the preceding winter, while the cattle were not in the Pasture, was repaired. R.340-341, App.19-20; R.412-413. With the fencing in proper working order, on May 30, 2019, Bruce Heggen rotated his cattle from the yards at his house to the Pasture. R.413; Heggen App.3. The cattle were removed from the Pasture in June. R.413; Heggen App.3. Bruce rotated 104 calf-cow pairs and 5 bulls into the Pasture on July 31, 2019, where they were on the day of the accident, October 12, 2019. R.413; Heggen App.3.

On the morning of October 12, 2019, Bruce checked the fence around the Pasture in the morning to ensure it was in place and operating as intended. R.341, App.20. All

104 calf-cow pairs and 5 bulls were in the pasture. R.341, App.20. Thereafter, Bruce checked the fencing of the Pasture multiple times that day, as he drove past the Pasture. R.341, App.20. On the evening of October 12, 2019, Bruce checked the Pasture to ensure the fence was in place, the electric fence was working, and the cows were all enclosed—just as he did every evening when the cows were in the Pasture. R.341, App.20. All of the fencing was in place, the electric fence was operational, the gates were closed, and all 109 head of cattle and their calves were within the enclosure. R.341, App.20.

At approximately 1:00 a.m. on October 13, 2019, a Minnehaha County Sheriff deputy contacted Bruce to inform him that he may have had a cow get hit on Highway 11. R.341, App.20. Bruce went to the scene of the accident, saw the cow, and went home to get his payloader to pull the cow off the road. R.342, App.21. Bruce then went to the Pasture to check all of the fencing and to make sure no other cattle had escaped. R.342, App.21. Bruce found the barbed wire was in place and there were no holes in the fence. R.342, App.21. Bruce also checked the electric wire to ensure it was in place, and he used a voltage tester to ensure that it had the proper voltage running through it. R.342, App.21. Bruce also confirmed all of the gates were closed. R.342, App.21. Bruce observed no issues with the fencing or any areas where the cow could have escaped. R.342, App.21. No other cattle were outside of the enclosure. R.342, App.21. Bruce then returned home and went to bed.

The next morning, Bruce went back to the Pasture to check the fences again in the daylight. R.342, App.21. Bruce found no areas where the fence was down; he saw no areas of the fence with hair in the barbed wire, and no gates were open. R.342, App.21.

There were no signs of how the cow escaped, and all other cattle were accounted for. R.343, App.22. Bruce did not receive a citation after the accident and the cow was never declared to be running at large. R.344, App.23.

STANDARD OF REVIEW

The Court reviews a circuit court's entry of summary judgment *de novo*. *Davies v. GPHC, LLC*, 2022 S.D. 55, ¶ 17, 980 N.W.2d 251, 258. The standard of review in summary judgment cases is to determine "whether genuine issues of material fact exist and whether the law is correctly applied." *Schulte v. Progressive N. Ins. Co.*, 2005 S.D. 75, ¶ 5, 699 N.W.2d 437, 438. The Court will affirm, "[i]f any legal basis exists to support the trial court's ruling." *Id.*

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). "The party challenging summary judgment must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Quinn v. Farmers Ins. Ex.*, 2014 S.D. 14, ¶ 20, 844 N.W.2d 619, 624-25. "Mere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment." *N. Star Mut. Ins. v. Korzan*, 2015 S.D. 97, ¶ 21, 873 N.W.2d 57, 63. The "summary judgment standard recognizes that a party resisting summary judgment is entitled to all 'reasonable inferences' in their favor that are supported by the evidence, but where the evidence along with any reasonable inferences requires 'speculation, conjecture, or fantasy' to support the claim, summary judgment *must* be

granted.” *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 28, 969 N.W.2d 208, 215 (emphasis added).

ARGUMENT

In her Complaint, Plaintiff alleged the Heggens were negligent because they failed to properly maintain their fencing, which she claimed resulted in the cow escaping, and further claimed the Heggens were liable under the theory of negligence per se for violating Section 3.02 of Minnehaha County Ordinance 52-17 and Minnehaha County Ordinance 46-14, R.4-6. South Dakota, however, has never imposed strict liability on a landowner for cattle that escaped and are struck on the highway. Just as a landowner is not the insurer of the safety and welfare of those on his land, *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 23, 780 N.W.2d 497, 504, the Heggens are not an insurer of the safety and welfare of those who drive down the highway. To avoid summary judgment, Plaintiff was required to show that she could place sufficient evidence in the record at trial to show the cow escaped due to the Heggens’ negligence. *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765. She failed to do so.

The circuit court properly granted summary judgment in favor of the Heggens because Plaintiff failed to present any evidence that the cow escaped due to the Heggens’ negligence or that the Heggens could have reasonably anticipated the cow would escape. The circuit court also properly held that Ordinances 46-14 and Section 3.02 of Ordinance 52-17 could not form the basis of a negligence per se claim.

On appeal, Plaintiff claims the circuit court did not apply the correct standard because it “omitted consideration of a required element” and “invaded the province of the jury by acting as a fact finder.” Appellant’s Brief at 8. Summary judgment was properly

granted because Plaintiff failed to present evidence to establish a dispute of material fact and because her negligence per se claim was deficient as a matter of law.

I. Plaintiff Failed to Present Evidence that the Cow Escaped Due to the Negligence of the Heggens.

Summary judgment was granted because Plaintiff failed to present *evidence* that the cow escaped due to the negligence of the Heggens. In fact, Plaintiff failed to present any evidence of how the cow escaped or that the Heggens could have reasonably anticipated the cow would escape. The mere fact that a cow escaped its enclosure is insufficient to establish negligence or liability. See *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 22, 714 N.W.2d 84, 90 (requiring evidence that landowner was negligent and could have reasonably anticipated cow escape); *Nylen v. Dayton*, 770 P.2d 1112, 1115 (Wyo. 1989) (affirming summary judgment in favor of landowner, against negligence and negligence per se claims where plaintiff failed to present evidence of defendant's negligence); *Singh v. McDermott*, 996 N.W.2d 115, *2 (Iowa Ct. App. 2023) (recognizing that "a cow may come to be on a roadway without any act of negligence necessarily bringing it there."); *Ladnier v. Hester*, 98 So.3d 1025, 1028-29 (Miss. 2012) ("The mere fact that livestock escapes from an enclosure and an accident occurs is not evidence of negligence on the part of the owner; the plaintiff must prove actual negligence."); *Reed v. Molnar*, 423 N.E.2d 140, 145 (Ohio 1981) (noting "there has been judicial recognition that cattle and other domestic animals can escape from perfectly adequate confines"); *Wilson v. Rule*, 219 P.2d 690, 695 (Kan. 1950) ("we hold that the plaintiff had the burden of proving in order to make a prima facie case, that the horse with which plaintiff collided was unattended upon the highway because it[s] owner had failed to exercise due care in enclosing it, under all the surrounding facts and

circumstances. He made no attempt to do this and thereby failed to prove a cause of action sufficient to warrant the trial court in submitting the issues to the jury.”); *Akin v. Berkshire*, 512 P.2d 1261, 1262 (N.M. Ct. App. 1973) (reversing judgment in favor of the plaintiff because the mere fact that plaintiff struck a cow on the highway is insufficient to establish negligence); *Rice v. Turner*, 62 S.E.2d 24, 27 (Va. 1950) (holding that “[p]laintiff’s evidence is insufficient to prove that the cow was at large with the knowledge and consent of defendant, or that her escape from defendant’s premises was due to his negligence.”); *Moon v. Johnstone*, 337 S.W.2d 464, 469 (Tenn. Ct. App. 1960) (affirming summary judgment in favor of defendant, where plaintiff failed to present evidence that the bull escaped by reason of defendant’s negligence, and holding that owner of animal “is not liable if without his fault the animals have escaped from a pasture enclosed by a lawful fence or by an ordinary fence such as is generally required to restrain that kind of stock.”); *Brauner v. Peterson*, 557 P.2d 359, 361 (Wash. Ct. App. 1976) (“the presence of an animal at large on the highway is not sufficient to warrant application of the rule, i.e., the event must be of a kind not ordinarily occurring in the absence of someone’s negligence. A cow can readily escape from perfectly adequate confines.”); *Kiraly v. Smith*, No. 111635, 2015 WL 2134571, at *2 (Kan. Ct. App. May 1, 2015) (memorandum opinion not designated for publication) (affirming summary judgment in car versus cow case, holding the plaintiff “had to establish in the record some affirmative evidence regarding [the defendant’s] lack of reasonable precaution or due care.”); *Lockling v. Ammon*, No. A-01-208, 2002 WL 1475867, at *5-6 (Neb. Ct. App. Jul. 9, 2002) (not designated for permanent publication) (affirming summary

judgment in cow versus car case, where plaintiff failed to present evidence of negligence on the part of the defendant).

Plaintiff's failure to present evidence to support her claim was fatal. Her theories as to how the cow escaped the Pasture are pure speculation and unsupported by any evidence. As such, the Court properly granted summary judgment.

II. The Circuit Court Properly Applied the Correct Standard.

Plaintiff attempts to skirt her evidentiary deficiencies by claiming the circuit court erred by applying a "novel" two-step analysis for determining whether the Heggens breached the standard of care owed to Plaintiff. Appellant's Brief at 16. According to Plaintiff, the circuit court should have applied the standard for determining whether a duty exists in cases where livestock are allowed to roam at large. According to Plaintiff, the Court impermissibly failed to consider the traffic conditions, time of day, and character of the road. Appellant's Brief at 15-16 (citing *Eixenberger v. Belle Fourche Livestock Exchange*, 58 N.W.2d 235 (S.D. 1953)). Plaintiff's criticism is misplaced, and her arguments ignore the applicable law and the facts of this case.

This is not a case where the Heggens allowed their cow to roam free or run at large. The Heggens admit, given the location and character of the highway, that if a cow escaped, it could stray onto Highway 11. That danger is undisputed, and is why Bruce Heggen went to great lengths to ensure his cattle remained enclosed within the Pasture. The time of day, amount of traffic, or type of traffic have no bearing on whether the Heggens would anticipate that cattle would escape. As such, strict application of the negligence standard for cases involving livestock running at large is not applicable.

When framed correctly, as the circuit court did, the first question that must be asked is whether the Heggens should have reasonably anticipated that the cow would

escape. This is logical because the cow cannot stray onto the highway without first escaping. It is only after the livestock escapes that the character of the road, kind of traffic, time of day, etc. becomes relevant—as each has to do with the risk of the livestock causing damage to persons or property on the highway.

Plaintiff's misunderstanding of the appropriate standard is demonstrated by her contention that: "[b]usy traffic on the highway is a legally necessary factor to consider when determining whether a defendant should have anticipated an animal might escape." Appellant's Brief at 18. Plaintiff seems to ignore the fact that the time of day, condition of the road, or traffic has no bearing on whether the animal might escape in the first place. Under her argument, there would be a question of fact regarding foreseeability anytime a cow escaped near a busy highway—even if it was undisputed that the fencing was adequate, it was properly maintained, and there was no history of prior escapes, as is the case here.

Plaintiff's contention that the circuit court applied the wrong standard is also directly contradicted by the South Dakota Pattern Jury Instructions and this Court's previous opinions. South Dakota Pattern Jury Instruction 20-80-70 provides:

An owner or person in charge of livestock must exercise ordinary care to keep the livestock off highway rights-of-way if the owner or person should reasonably anticipate that the animals are likely to damage persons or property by being on the highway.

The comment to this Instruction reflects that: "[t]hese are negligence cases, and regular negligence rules and instructions are applicable." *Id.*

Likewise, in *Casillas v. Schubauer*, 2006 S.D. 42, 714 N.W.2d 84, this Court held that when the property is near a major highway, it is enclosed by a fence (i.e., the landowner does not allow his livestock to roam at large), there is no evidence that the

fencing was deficient or in disrepair, and there is no evidence that any gates were left open on the day of the accident—all of which are applicable in the present case—the inquiry turns entirely on whether the landowner had knowledge of a prior escape under the same conditions such that he could have “reasonably anticipated” the livestock would escape again. *Id.* ¶¶ 19-20, 22.

The *Casillas* Court held that the landowner did not meet its burden to show the absence of a genuine issue of material fact as to whether he breached his duty to plaintiffs, despite the fences being well-maintained, because there were facts reflecting the defendant had knowledge of the bull’s propensity to fight and the bull had escaped the same enclosure on a prior occasion when confined with another bull. *Id.* Simply put, because the bull escaped previously under the same condition, the Court held that the defendant “could have reasonably anticipated the black bull’s escape *and* the likelihood of an accident.” *Id.* ¶ 22 (emphasis added).

The *Casillas* case reflects that when there is no dispute that there is a duty owed, the applicable standard turns on whether the landowner had knowledge of prior escapes or other information such that he should reasonably anticipate the livestock would escape the enclosure. The standard applied by the circuit court was whether the Heggens could have reasonably anticipated the cattle could have escaped the enclosure and, if they did get out, whether the Heggens could have anticipated injury. R.744. This standard was consistent with *Casillas* and the facts of the case.

Because the undisputed facts confirmed that on October 12, 2019: (1) the fencing type and materials used by the Heggens were proper for the location; (2) the fence was in good shape and working order; (3) Bruce Heggen checked the fencing and confirmed it

was in good shape the night of the accident; and (4) there was no evidence of any cattle escaping the Pasture under the same circumstances, the circuit court properly found that there was no evidence to show that the Heggens could have reasonably anticipated the cow would escape. As such, the circuit court properly granted summary judgment in favor of the Heggens.

III. The Circuit Court Properly Held that There were No Genuine Issues of Material Fact.

Plaintiff next claims the circuit court erred by “weighing the evidence” and not viewing facts or inferences in her favor. Appellant’s Brief at 10-15. Plaintiff’s complaints relate to her failure to present evidence of the condition of the fence on October 12, 2019, evidence that the cow escaped due to the negligence of the Heggens, or relevant evidence that indicated the Heggens were on notice that the cow could escape on the day at issue. The Court properly excluded Plaintiff’s speculative contentions and determined that the prior escapes were not material.

A. Plaintiff Failed to Present Evidence that the Fence was in Disrepair on October 12, 2019.

Plaintiff argues there is a factual dispute about whether the fence was properly monitored and in poor condition on the night of the accident. As set forth above, *see supra* Part I, Plaintiff presented no evidence of the condition of the fence on October 12, 2019. Plaintiff did not testify of ever seeing any cattle out of the enclosure or noticing any issues with the fencing. Plaintiff did not present any evidence of neighbors identifying prior instances where cattle escaped the fencing of the Pasture. There is no evidence that any cattle escaped the Pasture once Bruce upgraded the fencing materials in 2010. As Plaintiff’s counsel conceded during the summary judgment hearing, “Yes, I agree there’s no evidence of cattle escaping this particular pasture after the prior escape

...” R.860; App.79 (Hr’g Tr. at 35: 18–25). Plaintiff had the burden to present evidence that the cow escaped due to the Heggens’ negligence and that the escape was reasonably foreseeable. The circuit court properly held that Plaintiff failed to submit such evidence. R.747.

Because Plaintiff presented no evidence that the fence was in disrepair (because it was not), Plaintiff attempted to avoid summary judgment by resorting to different theories as to why the fence *could* have been in disrepair. R.747. The theories advanced by Plaintiff as to how the fence might have been in disrepair are: (1) maybe the fence was in disrepair due to flooding in September; (2) maybe the electric fence was not at the correct height; or (3) maybe the barbed wire fence was not tight enough. Plaintiff relies on each of these theories to claim the jury could “infer” the fence might not have been in good condition on the night of the accident. None of these theories, however, are supported by any admissible evidence and are directly refuted by the evidence in the record. The circuit court correctly found that Plaintiff’s theories were insufficient to avoid summary judgment. As the court held, Plaintiff’s theories did not establish how the cow escaped, “let alone how Bruce negligently maintained the enclosure.” R.747.

Even a cursory review of the theories advanced by Plaintiff confirm the circuit court’s findings. The first theory assumes that the jury could “infer” that the fence was in disrepair on October 12, 2019, because there was flooding a month before the accident.¹ Plaintiff, however, has not presented any evidence to support this theory—nor any evidence that the ground was still saturated at the time of the accident. The evidence

¹ Plaintiff failed to present any foundation to support her reference to the data records for Split Rock Creek, and therefore, such evidence is not admissible and was not properly before the circuit court.

reflects that Bruce experienced some flooding in September, repairs were made where needed, and that the fence was inspected and in good condition on October 12, 2019.

The second and third theories assume that there may have been issues with the fencing—i.e., the fence might not have been tight enough or the electric wire might not have been at the right height. These theories were advanced by Plaintiff’s expert, Daniel Little, DVM. Dr. Little’s *theories* were correctly recognized as such. They were properly rejected as speculative, as they were not based on any evidence of the condition of the property on the night at issue. R.344, App. 23.

It is well established that “[m]ere speculation and general assertions, without some concrete evidence, are not enough to avoid summary judgment.” *Godbe v. City of Rapid City*, 2022 S.D. 1, ¶ 21, 969 N.W.2d 208, 213 (citation omitted). Plaintiff refers to her theories as circumstantial evidence, but they are nothing more than speculation. The theories are not supported by the evidence and require the jury to make multiple inferences and ignore the direct evidence in order to reach the theoretical conclusion advanced by Plaintiff. The circuit court properly held that these theories were not supported by evidence and rejected them as speculation.

The Court in *Godbe v. City of Rapid City*, 2022 S.D. 1, 969 N.W.2d 208, was faced with similar speculative allegations that storm Grate 4 in Rapid City was damaged on the day of the plaintiff’s accident. Like in this case, Godbes relied on inferences to show that it was possible that Grate 4 was modified and then damaged prior to the accident. Godbes supported this argument with “multiple inferences” based on the City welding straps on some other grates and the City’s plan to replace grates. *Id.* ¶¶ 26-31. Godbes suggested these facts “inferred” that straps were welded on Grate 4, and the

absence of straps on the photographs of Grate 4 was not conclusive proof that it had never been welded. *Id.* ¶ 26. The Court held that Godbes failed “to present any evidences to show that cross straps were ever welded onto Grate 4 and then torn off, leaving Grate 4 in a damaged condition on [the day of the accident].” *Id.* ¶ 28. The Court noted that the “summary judgment standard recognizes that a party resisting summary judgment is entitled to all ‘reasonable inferences’ in their favor that are supported by the evidence, but where the evidence along with any reasonable inferences requires ‘speculation, conjecture, or fantasy’ to support the claim, summary judgment must be granted.” *Id.* Therein, the Court found that the “multiple inferences” relied on by Godbes were not reasonable and that “[a] jury would be left to speculate as to whether Grate 4 had ever been fitted with cross straps that had been torn off.” *Id.*; *see, e.g., Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 S.D. 70, ¶ 18, 855 N.W.2d 145, 151 (holding that scientific possibility “did not establish an evidentiary basis that the . . . warnings were inadequate.”); *Kreager v. Blomstrom Oil Co.*, 379 N.W.2d 307, 311 (S.D. 1985) (holding that the speculation as to the source of water in storage tank was insufficient to avoid directed verdict); *Burley v. Kytac Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 38, 737 N.W.2d 397, 410 (“the fact that an accident occurred” is insufficient avoid summary judgment). Ultimately, the failure to present evidence to create a genuine issue of material fact that Grate 4 was damaged was fatal to Godbes’ case. *Id.* ¶ 32.

In this case, Plaintiff had every opportunity to produce evidence that the fence was not properly maintained, cattle previously escaped after the fence was upgraded, or that the Heggens could have otherwise reasonably anticipated a cow would escape.

Bruce Heggen's use of the Pasture was no secret. Plaintiff drove past the Pasture essentially every day for 18 years, including in the hours, days, weeks, and months before the accident. She drove by the Pasture between 6:00 and 7:00 p.m. on the evening of the accident, within an hour of sunset. Yet, Plaintiff never saw any cattle out of the Pasture nor noticed any issues with the fencing. After the accident, Plaintiff remained at the scene for nearly an hour and took photographs of her car and of the cow. Yet, she never saw any issue with the fence or saw how the cow escaped. She drove by the next day, and still did not notice any issues or any cattle out.

Because Plaintiff has no evidence of any issues with the fence prior to the accident or that the fence was in poor condition on the night of the accident, she resorts to arguing that the jury should be entitled to "infer" or speculate that the fence was in poor condition on the night at issue—whether due to prior flooding; the electrical wires might not have been at the correct height; or that the fence was not in good condition. Like the plaintiffs in *Godbe*, Plaintiff invites this Court to allow the jury to engage in speculation and conjecture as to the condition of the property on the night at issue, as possible explanations for how the cow escaped, in order to avoid summary judgment. This attempt was properly rejected by the circuit court.

B. The Circuit Court Properly Held that Prior Instances of Escape were Not Material to the Issue of Foreseeability.

Plaintiff claims the trial court erred by "weighing evidence" and "giving no credence" to historical references of prior cattle escapes. Plaintiff claims that the prior instances are evidence that the jury could have considered in order to determine whether it was foreseeable that the cow would have escaped on the day at issue. The "prior

instances” of escape that Plaintiff alleges put the Heggens on notice that the cow could escape on the night at issue are:

1. In 2010, when a cow escaped the perimeter of the Pasture and was struck by a vehicle;
2. Cattle escaped 6-7 years before the accident because a state worker backed through the gate;
3. One or two cattle escaped onto Highway 11 in the past 65 years; and
4. On occasions, cattle from neighboring fields would get through interior fencing and end up on property owned by the Heggens.

Appellant’s Brief at 13.

The Heggens, as the moving party, had the burden to show the absence of a genuine issue of material fact as to whether they breached their duty to Plaintiff.

Casillas, 2006 S.D. 42, ¶ 23. The Court properly found that the Heggens met their burden by proving that the “instances of past cattle escape” were not material and granted summary judgment in favor of the Heggens because such instances had no bearing on whether the Heggens could have reasonably anticipated that a cow would escape on the night at issue.

This Court has recognized that prior instances of cattle escaping under the same conditions *could* be relevant to whether the landowner could have reasonably anticipated the escape, if the circumstances of the escapes were similar. *See Casillas*, 2006 S.D. 42, ¶ 22. As discussed above, *supra* Part II, the *Casillas* Court reversed summary judgment because the defendant, knowing the bull’s propensity to fight and prior instance of escaping the corral, put the same bull in the same corral with another bull. *Id.* Thus, he could have anticipated that the bulls would fight and could escape. *Id.*

In *Zeeb v. Handel*, 401 N.W.2d 536 (S.D. 1987), the Court reversed summary judgment in favor of the defendant, where the evidence showed that the defendant had

not maintained their fencing for thirteen years and that his cattle escaped the day before the accident. *Id.* at 537. Because there was evidence that the cattle escaped the pasture the day before and were put back without any repairs being made, the Court held there was a question of fact as to whether the defendants could have reasonably anticipated that the cattle would escape on the day of the accident. *Id.*

In *Pexa v. Clark*, 176 N.W.2d 497 (S.D. 1970), the plaintiff was injured when he struck one of the defendant's horses on the highway. *Id.* at 498. At the time, all seven of the defendant's horses had escaped. There was evidence presented that the defendant's horses were routinely outside their confines, and were able to go in and out of the enclosure as they wanted. *Id.* at 498-99. The Court held that "there was sufficient evidence for a jury to find they were negligent in their duty to maintain their fences sufficient to confine the horses" because there was evidence that the defendant's horses would routinely escape the pasture. *Id.* But here, there was no such evidence. *See e.g., Davies*, 2022 S.D. 55, ¶ 40 (affirming summary judgment in favor of defendant where plaintiff failed to establish a factual question on the issue of breach of duty where plaintiff did not present evidence that landlord had knowledge that the dog had dangerous propensities).

As recognized by the circuit court, the facts of the prior escapes in this case are not the same as those in *Casillas*, *Zeeb*, and *Pexa*. Unlike *Casillas*, *Zeeb*, and *Pexa*, the Heggens made upgrades to the fence after the last occasion when a cow escaped—in 2010. The upgrades were successful. While there may have been an occasion over the years where a third-party cut a fence or backed into the gate, which could have allowed a cow to escape, there is no evidence of any cattle escaping the perimeter fencing of the

Pasture after upgrades were made in 2010.² As Plaintiff's counsel conceded during the summary judgment hearing, "Yes, I agree there's no evidence of cattle escaping this particular pasture after the prior escape" R.711, App.79 (Hr'g Tr. at 35: 18–25). Plaintiff's counsel's admission confirms that Bruce Heggen did not experience any escapes after upgrading the fence. Her statement also confirms there was no dispute that the Heggens had no issues with escape after upgrading the fencing—nine years earlier. *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D. 1987) ("An admission of fact by an attorney is binding on that party."); *Harmon v. Christy Lumber, Inc.*, 402 N.W.2d 690, 692–93 (S.D. 1987) ("A judicial admission is a formal act of a party or his attorney in court, dispensing with proof of the fact claimed to be true, and is used as a substitute for legal evidence at the trial.").

Plaintiff's claim that the circuit court improperly "weighed" the four "instances" of cattle escaping is misplaced. A review of the record confirms that the circuit court correctly determined that such instances were not relevant or material. There were no material facts in dispute and no reasonable inferences drawn from the past instances of cattle escape that suggested the Heggens were on notice that their cow would escape on October 12, 2019.

C. The Circuit Court's Ruling is Consistent with Other Courts that Have Addressed Similar Circumstances.

The circuit court's decision is also consistent with holdings of other courts that have addressed analogous situations to those in this case—where Plaintiff has no

² Plaintiff does not challenge the circuit court's determination that the conduct of the third-parties are "uncontrollable, intervening forces" or that "cutting the fences was not an issue here." R.746. Plaintiff's counsel also agreed that she was not claiming that there was a genuine issue of material fact that Bruce Heggen was negligent because of a third-party's conduct. R.874-875 (Hr'g Tr. 49: 22–50; 1).

evidence of negligence, the fencing was appropriate, maintenance was performed, and the fence was inspected the day of the accident.

The facts and allegations in *Walborn v. Stockman*, 706 P.2d 465 (Kan. Ct. App. 1985), are nearly identical to the present case. In *Walborn*, the plaintiff hit a cow that had escaped the defendants' property. *Id.* at 466. Thereafter, like in this case, she brought suit against the owner of the cow alleging they were negligent for allowing cows to run at large in violation of Kansas law and for failing to inspect the cows more often. *Id.* The trial court found that the defendant was negligent. *Id.* On appeal, the Kansas Supreme Court reversed, because Plaintiff failed to present competent evidence to support a finding of negligence under any theory. *Id.*

The court held that the plaintiff was required to present *evidence* that "the cow was unattended because the defendant failed to exercise due care in keeping it enclosed." *Id.* at 467-68. The evidence in the case, like in this one, reflected the uncontroverted testimony of defendant that he checked his fencing by driving around the perimeter of the pasture after the accident and the fences were in good condition, no strands down, and all posts were up. *Id.* at 468. Thus, the Court held that plaintiff failed to show a lack of due care on defendant's part to keep the cow enclosed. *Id.*

As for the negligence allegations for failing to inspect the property more often, the record, in *Walborn*, reflected that the defendant or his brother visited the property every day or every other day, defendant never had a cow escape the pasture, and all fences enclosing the cow appeared to be adequate. *Id.* As such, the court held "there were no circumstances present here which would have made a reasonable person anticipate that his cow would escape." *Id.*

The facts of this case are also analogous to those in *Lockling v. Ammon*, No. A-01-208, 2002 WL 1475867 (Neb. Ct. Jul. 9, 2002) (unpublished). While not designated for permanent publication, the factual similarities and legal analysis in *Lockling* make it compelling. In *Lockling*, the plaintiff struck a cow on a highway and died. *Id.* at *1. His personal representative brought a negligence action against the caretaker of the cow that was struck. *Id.* Like in this case, the evidence presented by the defendant reflected that the fencing was in good condition and was proper to confine and restrain cattle, and at no time prior to the collision was the defendant aware that his cattle had escaped from the pasture. *Id.* Like in this case, the day after the accident, the defendant checked the pasture and inspected the fence and gates and found nothing wrong. *Id.* The defendant did not know how the cow escaped, and no other cows had escaped from the pasture that year or in previous years. *Id.* Unlike this case, the plaintiff presented evidence that a cow and calf were spotted near the accident scene on the morning of the accident. *Id.* at *2. Based on these facts, the trial court granted the defendant's motion for summary judgment.

The Nebraska Court of Appeals affirmed, noting the defendant checked the fence two days before the accident and did not find any defects and that it was in good shape on the day after the collision. *Id.* The Court also noted that the fencing, like the fencing in this case, was not "state-of-the-art" cattle fencing. *Id.* It consisted of wooden posts with three and four stands of barbed wire, which was sufficient to restrain cattle. *Id.* However, the fencing was not fail-proof. *Id.* Like in this case, the evidence in *Lockling*, reflected that there were many factors, beyond the control of the person responsible for the cow, that can cause a cow to escape, and that only one cow escaped. *Id.*; see *Jewet v.*

Miller, 263 P.3d 188, 193 (Kan. Ct. App. 2011) (affirming summary judgment in favor of landowner where evidence showed the landowner inspected his fence, repaired them as necessary, and never had problem with animals escaping, and plaintiff failed to present more than “speculation and conjecture” about theories on how the horse escaped); *see also cases* cited in Part I, *supra*.

The circuit court in this case, like courts in *Lockling* and *Walborn*, properly found that Plaintiff failed to present evidence to suggest that the Heggens could have reasonably anticipated that the cow would escape. The fencing was appropriate to restrain cattle; Defendant inspected it daily and confirmed it was in good condition and working as intended on the day of the accident; one cow out of the 109 cattle in the Pasture escaped; and there were no past instances of escapes in the previous 9 years.

The reality of this case is that livestock fencing is not perfect. Cattle are sentient creatures, and there were many factors that could allow cattle to escape, through no fault of the Heggens, including third-parties opening the fencing or gates, the weather, the cow jumping over the fence, cattle running through the fence, cattle breaking clips to the electrical wire, and intruding animals or forces of nature. *See* R.343, 432, 434; R.506 (Bruce Depo. at 33: 8–12) (testifying that deer will damage the fence when they try to jump over it); R.629 (Little Depo. at 98: 9–17) (testifying the cow could have broken the clips to the electric fence after dark). South Dakota law firmly establishes that landowners are not liable for car accidents simply because their livestock escapes. *Casillas*, 2006 S.D. 42, ¶ 22; *Pexa*, 176 N.W.2d at 498-99; *Zeeb*, 401 N.W.2d at 537; S.D. Pattern Jury Instruction 20-80-70; *Burley*, 2007 S.D. 82, ¶ 38. Landowners are not insurers of the traveling public. It was Plaintiff’s burden to present evidence that the cow

escaped due to the negligence of the Heggens. She failed to meet that burden, and the circuit court properly granted summary judgment in favor of the Heggens.

IV. The Circuit Court Properly Granted the Heggens' Motion for Summary Judgment on Plaintiff's Negligence Per Se Claim.

Plaintiff, next, contends that the circuit court erred by granting summary judgment in favor of the Heggens on her negligence per se claim. According to Plaintiff, the court improperly "imposed a heightened standard tantamount to a private right of action." Appellant's Brief at 18. Plaintiff cites no authority to support her claims. The circuit court's determination that neither Ordinance could support a negligence per se claim was correct. R.748-751, App.12-15.

Plaintiff's "negligence per se" claim alleged the Heggens were negligent as a matter of law for violating Section 3.02 of Minnehaha County Ordinance 52-17, which addresses animals running at large, and Minnehaha County Ordinance 46-14, which prohibits obstructions within the road right-of-way. R.6. The circuit court held that neither Section 3.02 of M.C. 52-17 nor MC 46-14 could support a claim of negligence per se because neither created an established standard of care, protected a class of persons, or contemplated an injury would result from a breach of either ordinance. R.749, 751, App.13, 15. In addition, the undisputed evidence confirms that the Heggens did not allow their cattle to run at large, and further forecloses on Plaintiff's negligent per se case.

A. Cattle-Collision Cases are Governed by a General Negligence Standard.

Without any evidence that the escape was foreseeable, Plaintiff seeks a holding that the Heggens breached a duty to her as a matter of law. Her reliance on these ordinances is misplaced.

In order to establish a claim of negligence per se, a plaintiff must establish: (1) the defendant violated a statute or regulatory standard that was enacted to protect persons in the plaintiff's position or prevent the type of accident that occurred; (2) the injured party was within the class of persons whom the legislative body intended to benefit and protect; and (3) the negligence was the proximate cause of the injury. *Davies*, 2022 S.D. 55, ¶ 43. The circuit court properly held that the Ordinances relied upon by Plaintiff could support a negligence per se claim.

As recognized by the circuit court, Section 3.02 of Ordinance 52-17 "provides a general prohibition of animals running at large, the definition of such, and an authorization of law enforcement to remove or impound the animal. This ordinance may create a duty of care, but it does not create a protected class of citizens or contemplate an injury that would result from a breach of such care." R.749. It sets forth the scope and authority of the Animal Control Officer, Law Enforcement Officer, or their authorized designee. It authorizes them to control, impound, and dispose of an animal that is running at large. The circuit court properly found that this Ordinance does not establish any duty to a third party, does not create a private cause of action, and does not provide or indicate the intention to protect those on the highway or prevent car accidents.

Plaintiff contends that Ordinance 52-17 creates a protected class of people—those who reside in unincorporated Minnehaha County. This argument was properly rejected. Not only does Section 3.02 not provide a class of people, nor even reference the protection of a third-person, but had the County Commissioners intended to protect a class, it would have been those traveling on the highway—not simply the limited few

who happen to live in the unincorporated portions of Minnehaha County.³

Furthermore, the circuit court properly recognized that Ordinance 46-14 concerns obstructions in the roadway for snow removal purposes. On its face, this ordinance is intended to benefit the snow removal services and to allow them to safely and quickly provide snow removal services. The court properly noted that Ordinance 46-14 addresses inanimate objects and “does not address livestock, animals, or other living beings[;]” nor does it “contemplate the danger of livestock being on the road.” R.750.

When compared to SDCL Ch. 40-28, as the circuit court did, it is clear that neither ordinance was intended to provide a safety statute nor apply to the running at large of livestock. SDCL Ch. 40-28 reflects the legislature’s intention to create a standard of care, protected class, and prevent a class of injury. SDCL 40-28-3 defines running at large. SDCL 40-28-1 sets forth the duty imposed on people not to allow their livestock to run at large. SDCL 40-28-4 outlines the liability that will be imposed for those who allow their livestock to run at large. SDCL 40-28-18 provides the damages that may be recovered for a violation of SDCL 40-28-4. The absence of any of these provisions in Ordinances at issue is telling.

The circuit court properly recognized that neither Ordinance contained any of the specificity necessary to support a claim of negligence per se.

B. The Heggens did not Violate Section 3.02 of Ordinance 52-17 or Ordinance 46-14.

The Heggens also argued to the circuit court that Section 3.02 of Ordinance 52-17 and Ordinance 46-14 were not applicable because the Heggens did not permit their cow

³ According to Plaintiff’s argument, residents of *incorporated* Minnehaha County are not a protected class, and they could not bring a negligence per se claim under Ordinance 52-17. This protected class is arbitrary and untenable. It makes no sense.

to run at large. R.335; R.604-605. This argument was not directly addressed by the circuit court. However, “this Court will affirm the circuit court’s ruling granting a motion for summary judgment if any basis exists to support the ruling.” *Discover Bank v. Stanley*, 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762; *Davies*, 2022 S.D. 55, ¶ 44 (determination of whether facts meet the qualifications of a statute for purposes of negligence per se is a legal question of interpretation). Therefore, even if Section 3.02 of Ordinance 52-17 or Ordinance 46-14 could support a claim of negligence per se, summary judgment should still be affirmed because the undisputed facts confirmed that the Heggens did not violate either Ordinance, as they did not permit the cattle to run at large, nor place the cow in the right-of-way.

Section 3.02 of Ordinance 52-17 does not comprehend a situation where animals escape from their owner, after due precaution to secure them has been taken, and without fault or negligence on the part of the owner. It prohibits those from “permitting” or intentionally allowing their cattle to run at large. *Id.*; SDCL 40-28-3 (defining “running at large” as “intentionally left outside of the enclosure of a fence, and off of the lands owned or controlled by the owner of such animal.”). Ordinance 46-14, similarly, concerns situations where a party intentionally places or unintentionally leaves an inanimate object in the road right-of-way.⁴ It is undisputed that the Heggens did not permit, leave, place, or let the cow enter the roadway.

Therefore, the Heggens did not breach either Ordinance, and summary judgment should be properly granted on this basis. *See Wilson*, 219 P.2d at 695 (“It is generally

⁴ It is also undisputed that the cow did not interfere with snow removal, which is the underlying premise of Ordinance 46-14. R.750.

held, under statutes prohibiting horses and cattle going at large, that when they escape from their owner's enclosure without his fault or negligence they are not at large in the legal sense of the term."); *Sork v. Taylor Bros., Inc.*, 277 N.E.2d 5, 7 (Ind. Ct. App. 1971) (before running at large statute can be applied, "there must be evidence or a reasonable inference therefrom that the owner of the animals had either actual or constructive knowledge that his animals were outside of the enclosure and beyond his immediate control."); *Cooper v. Eberly*, 508 P.2d 943, 952 (Kan. 1973) ("Suffering or permitting an animal to go at large implies knowledge, consent, or willingness on the part of the owner, or such negligent conduct as is equivalent thereto; but does not comprehend a case where animals escape from their owner, after due precaution to secure them has been taken, and without fault or negligence on his part, and he makes immediate and suitable efforts to recover them."); *Rose v. Ben C. Hebert Heirs*, 305 S.W.3d 874, 881 (Tex. Ct. App. 2010) (affirming summary judgment in favor of defendant against plaintiff's negligence per se claim where there was no evidence that that the defendants "permitted" the bull to run at large).

CONCLUSION

The circuit court should be AFFIRMED.

Dated at Sioux Falls, South Dakota, this 17th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 9,406 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 17th day of December, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Appellees, was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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THE HEGGENS' APPENDIX

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7. I have rotated cattle through the Pasture in the same process since approximately 2000. During the winter months, from approximate November until med-February, the cattle are kept in the fields located on the section of land where my house is located. I typically start calving in February of each year, and in mid-February, I move the cows to yards at the homeplace, where the cows and their calves stay until May. In late May or early June, I will move the cattle from the homeplace to the Pasture across the street from my house. The cattle will stay in the Pasture until the end of June or early July, when they are rotated out. The cattle are rotated back into the Pasture in the end of July. They will remain in the Pasture until the end of October or beginning of November, when they are rotated back to the section where my house is located.

8. The Pasture is enclosed with a 5-strand barbed wire fence. In addition to the barbed wire, I use a high-tensile electric fence that is set back approximately 18" from the barbed wire. In addition, I use fence indicator lights which show that the electric fence is electrified and has the proper kilovolts. If the lights are flashing, then I know the wire is energized. If the lights are not flashing or are dimly lit, then I know the wire either has a short or has been broken. This is an added safeguard to help make sure that the electric fence is working at all times.

9. I do not check the fence or perform maintenance on the fence around the Pasture during the winter months, from November until May, while the cattle are being kept elsewhere. Over the course of the winter, between the snow, the snow plows, and the wildlife, the fencing around the Pasture can become in disrepair.

10. Since 2000, every time before I rotate the cattle into the Pasture, I check the fencing to make sure everything is in place and operating as intended, this includes but is not limited to confirming the posts are properly in place, the barbed wires are tight, and that the

high-tensile electric wire is in the correct location, the clips are connected, and that the wire is receiving the proper amount of electricity. If any part of the fence is damaged or out of place, I will perform the necessary repairs before I release the cattle into the Pasture.

11. While the cattle are out to Pasture, I check the fencing adjacent to Highway 11 every day to make sure that it is in place and operating as intended. When the cattle are in the Pasture, I assess the fence, make sure the barbed wires are tight, the posts are upright, the electric wire is in place, and is operating every time I drive down Highway 11 past the Pasture. I drive the fence lines surrounding the entire Pasture two to three times a week.

12. In 2019, I rotated 104 calf-cow pairs, including the cow that was struck by Plaintiff, and 5 bulls into the Pasture for the on May 30. The cattle remained in the Pasture until June 28. I rotated the cattle back into the pasture on July 31, where they remained until October 14, when they were moved to the home section for the winter.

13. In 2019, before returning the cattle into the Pasture, I inspected the fences to make sure the barbed wire fence was up, the wires were tight all the way around, and that they were all attached to the posts. I also checked the electric fence to ensure it was electrified and that it worked all the way around the whole field. I then constantly checked on the cattle and the fencing while the cattle were in the Pasture. Every morning, night, and time I drove down Highway 11 past the Pasture, I checked the fields to ensure the cattle were in their enclosure and the fences, including the electric fence, to ensure they were operating as intended, and that the gates were closed.

14. On October 12, 2019, there were 104 calf-cow pairs and 5 bulls in the Pasture. On October 12, 2019, I checked the Pasture fence adjacent to Highway 11 in the morning to ensure it was in place, operating as intended, all of the gates were closed, and that the cattle were

all in the pasture. I checked the fencing and gates multiple times that day, as I drove past the Pasture. Prior to nightfall on the evening of October 12, 2019, I checked the pasture to ensure the gates were closed, the fencing was in place, that the electric fence was working, and that the cows were all enclosed. That evening, all of the fencing was in place, the gates were closed, the electric fence was operational, and all approximately 109 head of cattle and calves were within the enclosure.

15. I first learned that a cow had escaped from the Pasture at approximately 1:00am on the morning of October 13, 2019, when the Minnehaha County Sheriff's deputy called me and told me that I may have had a cow get hit on the highway. Thereafter, at approximately 1:30am on October 13, 2019, I checked all of the fencing at the Pasture and made sure no other cattle had escaped. I did not find any barbed wire was out of place and there were no holes in the fence. I also checked the electric wire to ensure that it was in place, the lights were still flashing, and I used a voltage tester to confirm it had the proper voltage running through it. I also confirmed that all of the gates were closed. I did not observe any issues with the fencing or any areas where the cow could have escaped. No other cattle were outside of the enclosure. I then returned home and went to bed.

16. At approximately 6:00 the next morning, in the daylight, I went back to the Pasture to check again to see if I could determine where or how the cow escaped. Upon my inspection, I found no areas where the fence was down or barbed wires were pulled loose. All of the gates were closed, and the electric fence was in place and operating as intended. There were no signs of how the cow escaped, and all other cattle were accounted for.

17. I did not allow or permit the cow to be outside of the enclosure on the night of October 12, 2019, nor did I have any notice that the cow had escaped from the Pasture prior to

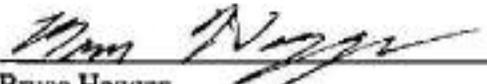
being informed by the Deputy Sheriff that the accident occurred. In the approximately 3.5 months that cattle were in the Pasture in 2019, no other cattle escaped from the Pasture and accessed Highway 11.

18. Prior to this incident, the only other time a cow escaped from the pasture and was struck by a vehicle on Highway 11 was in 2010. At that time, the pasture was enclosed with a 5-strand barbed wire fence and electric fence twine that was connected to the fence posts. During the same period in 2010, I had observed mountain lions in the area, and multiple calves had been killed by mountain lions. I discovered that the cow that escaped onto Highway 11 had claw marks on its back. Therefore, it is my belief that the cow was spooked by a mountain lion, which caused it to escape. After that incident, I upgraded the electric twine to high tensile electric wire that was set back 18 inches from the 5-strand barbed wire fence. After making these changes, until the accident at issue and since the accident, I have not had any cattle escape the fencing that surrounds the Pasture and access Highway 11.

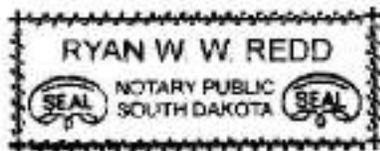
19. I did not receive any citation as a result of Plaintiff striking my cow, nor have I been made aware that the cow Plaintiff struck was declared to be running at large.

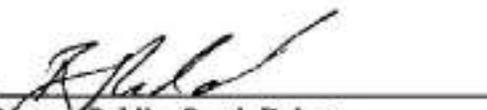
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Dated at Sioux Falls, South Dakota, this 15 day of February, 2024.


Bruce Heggen

Subscribed and sworn to before me this 15th day of February, 2024.




Notary Public, South Dakota
My commission expires: 3/22/2024

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30773

AMBER ELIZABETH FRERK,
Plaintiff-Appellant,

vs.

LEO DEAN HEGGEN, JOANNE B. HEGGEN, and BRUCE HEGGEN
Defendants-Appellees.

APPELLANT'S REPLY BRIEF

Appeal from Circuit Court
Second Judicial District,
Minnehaha County, South Dakota

The Honorable Douglas P. Barnett, presiding

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Notice of Appeal filed July 24, 2024.

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ARGUMENT

I. Response to Jurisdictional Statement Regarding SDCL 15-26A-23.

SDCL 15-26A-24 states that a bond for costs or deposit of money in lieu thereof shall be deemed waived upon the written consent of each appellee. Here, on July 31, 2024¹, counsel for the parties exchanged emails regarding the treatment of costs on appeal.² Plaintiff-Appellant (“Ferk”) provided a proposal to provide appropriate security to Appellees during the pendency of the appellate process. In response to that proposal, counsel for Defendants-Appellees (“Heggens”) indicated there was no need for such assurances. Instead, the Heggens indicated they would collect costs if the judgment was affirmed on appeal. Ferk understood this to be an agreement of waiver pursuant to SDCL 15-26A-24.

Months later, the Brief of Appellees claimed jurisdictional deficiency since no bond for costs was filed pursuant to SDCL 15-26A-23 and requested outright dismissal of the appeal. This argument and requested relief should be rejected for three reasons.

First, the Heggens provided a written waiver of the surety for costs contemplated by SDCL 15-26A-23. Ferk relied upon the words of counsel for the Heggens that any collection of or surety with respect to costs isn’t necessary unless the underlying judgment is ultimately affirmed. This conduct and subsequent reliance support the application of judicial estoppel. *A-G-E Corp. v. State*, 2006 SD 66, ¶ 32, 719 N.W.2d 780, 789.

Second, compliance with SDCL 15-26A-23 is not a prerequisite for this Court to assume jurisdiction. Any failure to post bond within the statutory period does not divest a

¹ This exchanged occurred one week after the filing of the Notice of Appeal.

² Ferk will separately file a request to supplement the record with the email exchange referenced above.

court of jurisdiction. *Gesinger v. Gesinger*, 531 N.W.2d 17, 22 (S.D. 1995); *Bison Twp. v. Perkins Cnty.*, 2002 S.D. 22, ¶ 13, 640 N.W.2d 503, 506. Moreover, a failure to file a bond by reason of mistake or accident is a curable defect. *Morrison v. O'Brien*, 17 S.D. 372, 97 N.W. 2 (1903).

Third, to the extent the matter is jurisdictional in nature, any deficits with compliance of SDCL 15-26A-23 have been cured. Frerk provided a deposit with the clerk of the circuit court for \$500.00 pursuant to SDCL 15-26A-41 and filed a notice of the same in the underlying circuit court action.

Accordingly, this Court has jurisdiction to hear this appeal and should decline to dismiss the appeal due to any issues of compliance with SDCL 15-26A-23.

II. The Circuit Court Improperly Dismissed Frerk's Claims of Negligence against the Heggens.

The lower court appropriately determined the legal issue that the Heggens had a duty of care in this case. But after making this determination, it applied the incorrect standard when assessing whether the evidence proffered was sufficient to allow the matter to proceed to a jury.

a. The long-standing case law on automobile-cattle collisions applies to this case.

The Heggens argue that "strict application of the negligence standard for cases involving livestock running at large is not applicable." *See* Appellees' Br. at p. 16. But there is no legal basis to refuse to apply existing precedent to the circumstances here. The lineage of case law shows that the standard is the same regardless of whether the livestock is fenced or unfenced. *See, e.g. Eixenberger v. Belle Fourche Livestock Exchange*, 58 N.W.2d 235 (S.D. 1953) (unfenced) and *Pexa v. Clark*, 85 SD 37, 40, 176 NW2d 497, 499 (1970)

(fenced). There is no legal basis to abandon the common law standard that has been imposed by this state for decades.

The appropriate inquiry is whether a defendant should have anticipated livestock escape would cause injury when considering the character of the road, the kind of traffic thereon, the time of day, and all other pertinent facts and surrounding conditions. *Atkins v. Stratmeyer*, 600 N.W.2d 891, 898 (S.D. 1999). This single-step inquiry using a multi-factor analysis was not followed by the trial court.

In addition, the Heggens urge use of a narrower standard than exists now: that the circumstances of any past livestock escape must have occurred in nearly identical circumstances to “count.” See Appellees’ Br. at pp. 24-26. *Eixenberger* and its progeny provide no requirement that past instances of livestock escape must be similar in nature to what occurred during the subject incident to be considered as evidence. Rather, the law provides only that the determination of whether a defendant should have reasonably anticipated the danger should be discerned from the pertinent facts and surrounding conditions. *Casillas v. Schubauer*, 714 N.W.2d 84, 89. Past escapes are part of the specific facts of the case and surrounding conditions that must be considered when assessing negligence. Past escapes from the same pasture (even if different forms of fencing may have been used) as well as livestock escapes from other enclosures both have bearing on whether a livestock owner or keeper was negligent.

The lower court’s failure to consider evidence of past escapes reveals the evidence was not viewed in the light most favorable to Frerk as the non-moving party. The Heggens claim the circuit court discarded those past incidents of escape as “not relevant or material,” Appellees’ Br. at p. 26. But the circuit court expressly addressed the evidence of the past

escapes without making a finding that such evidence was irrelevant or immaterial. Appx. 002, 004.

Ultimately, the trial court stood in the shoes of the fact finder by giving no weight to evidence of past cattle escapes after certain fencing upgrades were made. But those past escapes are facts that cannot be rejected by the court when applying the summary judgment standard. Viewed in Frerk's favor, past incidents of cattle escapes weigh in favor of finding that the defendant should have reasonably anticipated the danger of cattle straying onto Highway 11. While a jury may not ultimately find livestock escapes before the fencing upgrades bear heavily on the Heggens' negligence, the trial court faced with a summary judgment motion cannot.

b. Frerk's negligence claim was supported by relevant and material evidence.

Plaintiff's negligence claim against the Heggens was backed by more than the cow's presence on the roadway alone. Plaintiff presented significant evidence touching on each factor used to determine negligence when a loose cow strays onto a roadway. Yet the Heggens continue to argue that Frerk presented no evidence at all that bears on their negligence. Appellee Br. at pp. 14-15. If that was the case, this Court would need to determine, after review of the record below, that none of the documentary, testimonial, or expert material submitted in response to the Heggens' summary judgment motion—construed in the light most favorable to Frerk—has any bearing on the factors used to assess liability in automobile-livestock collisions. That is not the case. The record provides a healthy body of evidence supporting each factor used to assess negligence.

Critically, there are multiple sources of evidence showing the subject pasture was waterlogged from significant flooding that destroyed the integrity of the fence line along

Highway 11 in the weeks leading up to the collision. The flooding and fence integrity problems with the Heggens' pasture are far from a "theory" unsupported by any evidence. The year the collision occurred, it was very wet and frequent flooding occurred in Heggens' pastures requiring repair of impacted fences. CCR 432 ¶7; 503; 547–550. Evidence of the flooding of the pasture in the weeks preceding the collision was shown through photographic evidence produced by the Heggens in discovery, testimony of the Heggens themselves, and public data³ showing persistent high-water levels. CCR 436 ¶54-55; 552 ¶16; 553 ¶29; 563. As a result of the flooding and review of the topography of the land, Frerk's expert identified the most probable manner the loose cow escaped: through an area of fence that was damaged or lost integrity.

In an effort to evade the consequences of considering each *Casillas* factor, the Heggens argue that the inquiry in this case "turns entirely on whether the landowner had knowledge of a prior escape under the same conditions." Appellees' Br. at pp. 17-18. An argument of this sort was previously rejected by this Court. *Atkins v. Stratmeyer*, 1999 S.D. 131, ¶ 24, 600 N.W.2d 891, 898 (rejecting argument that certain factors should not be considered in assessing whether a livestock owner could have anticipated straying onto highway since it "twist[s] the law").

Indeed, the *Atkins* court addressed the type of appropriate inference a fact finder could draw: testimony showing an open gate being the most probable manner the livestock escaped permits the "logical and obvious" conclusion that the gate was negligently left open. *Id.* *Atkins* shows that a plaintiff need not advance direct evidence of a breach

³ The Heggens challenge the admissibility of the USGS data proffered by Frerk below for the first time on appeal. Any objection to the consideration of such evidence for the purpose of summary judgment has been waived as a result.

livestock containment on the date of livestock escape for the claim to pass muster. Instead, use of expert testimony is permitted to provide the most probable manner the escape occurred based on the evidence.

Here, Dr. Little did just that. After assessing the fence construction, topography of the land, depositions, and discovery, he determined the most probable manner the cow escaped from the pasture. Like in *Atkins*, direct evidence of the state of the enclosure on the day of the escape is not needed for experts to offer opinions about what occurred.

III. The Lower Court Erred in Dismissing Frerk's Claims of Negligence Per Se.

The plain language of Minnehaha County Ordinance 52-17 sets forth its purpose and the class of persons it protects:

[T]he Minnehaha County, South Dakota, Board of County Commissioners finds it necessary to regulate the ownership and possession of animals in order to protect and promote the public health, safety and welfare for the residents [] in the unincorporated areas of Minnehaha County.

See Appx. 116 (emphasis added). Section 3.02 is part of this very same ordinance. *See* Appx. 120. Frerk did not claim that the residents of incorporated Minnehaha County were not a protected class. *See* Br. at p. 32 at n. 3. Instead, Frerk asserted she was a resident of unincorporated Minnehaha County and, consequently, was part of the class of persons the subject ordinances were intended to protect given the plain language of the law.

The Heggens' argument that Section 3.02 doesn't identify a class of people ignores a principle of statutory interpretation: the whole-text canon. "The whole-text canon 'calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.'" *See Rowley v. S. Dakota Bd. of Pardons & Paroles*, 2013 S.D. 6, 826 N.W.2d 360, 368 n. 5 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). The ordinance must

be viewed as a whole to provide context to ascertain the protected class covered by the different sections that follow. When applying the whole-text canon, it is clear that Ordinance 52-17—as well as each of its subsections—were enacted to protect the people that reside in unincorporate Minnehaha County. Further, the whole text canon also establishes that Section 3.02 was enacted for the purposes of safety.

The common law claim of negligence per se does not demand the law giving rise to such claim provide a remedy for damages. If that was necessary, negligence per se claims would become entirely moot because any aggrieved party could simply pursue a statutory-based claim instead. While proximate cause of a plaintiff's injury is a necessary element of a negligence per se claim, a law need not provide that damages may be recovered in a civil action to give rise to a viable cause of action. Common law provides for damages independently.

Nonetheless, review of the whole text of Minnehaha County Ordinance 52-17 is sufficient to establish a colorable negligence per se claim. It was enacted to protect residents of unincorporated Minnehaha County, like Frerk, from harm due to animals not under the immediate physical control of its owner, like the loose cow owned and kept by the Heggens that strayed onto Highway 11. It establishes that an animal that is not under the immediate control of its owner or keeper constitutes prima facie evidence that the owner permitted it to run at large. The evidentiary presumption contained in Ordinance 52-17, Section 3.02 must be considered when assessing whether the evidence presented at the summary judgment phase was sufficient to allow any of Frerk's claims to reach a jury.

Therefore, the court erroneously dismissed Plaintiff's negligence per se claims on summary judgment.

CONCLUSION

For the reasons set forth herein, Frerk requests this Court reverse the Circuit Court's order granting summary judgment on her negligence claims and remand the case to allow a jury to perform the factual inquiry of whether negligence occurred in this livestock-vehicle collision. Furthermore, Frerk requests the Court reverse the circuit court's order granting summary judgment on her negligence per se claims premised on the Minnehaha County ordinances at issue.

WHEREFORE Plaintiff respectfully requests that this Court reverse the Judgment of the circuit court.

DATED this 16th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Appellant's Reply Brief complies with the type volume limitation set forth in SDLRC Codified Law 15-26A-66(b)(2), and that this Brief consists of 2,768 total words and 17,305 characters with no spaces. I have relied upon the word and character count for the pertinent sections from the word processing system used to prepare this Brief.

DATED this 16th day of January, 2025.

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CERTIFICATE OF SERVICE AND PROOF OF FILING

The undersigned hereby certifies that on the 16th day of January, 2025, a true and correct copy of the foregoing Appellant's Reply Brief was filed and served using the Court's Odyssey File and Serve system which upon information and belief will send email notification of such filing to counsel for the Defendants-Appellees. An original of the above will be mailed to the Clerk of the Supreme Court to the following address:

Clerk of the Supreme Court
State Capital Building
500 E. Capitol Avenue
Pierre, SD 57501

DATED this 16th day of January, 2025.

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