Selected North Dakota Fencing Laws and Cases

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CHAPTER 24-10
CATTLE GUARDS AND GATEWAYS

24-10-01. Cattle guards - How permitted.

Whenever the erection of cattle guards is necessary to complete an enclosure which includes land on both sides of any highway in the state, except a highway which has been designated as part of the state highway system, or to cross a section line pursuant to section 24-06-28, the board of county commissioners, if the cattle guard is to be erected across a county road or a section line subject to jurisdiction of the board of county commissioners, or the board of township supervisors, if the cattle guard is to be erected across a township road or a section line subject to jurisdiction of the board of township supervisors, may issue permission to any person, firm, or corporation to erect a cattle guard and gateway across the highway or section line upon the conditions hereinafter prescribed.

24-10-02. Cattle guards - Construction - Maintenance - Effect.

Before any cattle guard and gateway may be erected across any highway or section line as authorized in section 24-10-01, the board of county commissioners or board of township supervisors, as the case may be, shall approve written specifications of the cattle guard and gateway. Specifications approved by the board of county commissioners must be filed with the county auditor and specifications approved by the board of township supervisors must be filed with the township clerk. The specifications must include requirements for warning signs to be placed approximately three hundred feet [91.44 meters] from and plainly visible to persons approaching the cattle guard upon the highway or section line. A cattle guard must be so constructed as to permit the passage of motor vehicles through and over the same. No cattle guard may be erected upon any highway or section line unless there also is provided adjacent thereto an ample gateway in which must be erected a gate which may be opened easily and closed by the public. The person who applied for permission to erect the cattle guard shall maintain the cattle guard and gateway, unless application is otherwise assigned. Within the limits of an enclosure so completed by authorized cattle guards erected in accordance with such specifications, livestock must be permitted to run at large without liability for being upon the highway or section line.

24-10-03. Leaving gates open - Penalty.

Any person who opens and fails to close promptly any gate provided for in this chapter is guilty of an infraction.

24-10-04. Cattle guards may be ordered removed.

The board having authority to permit the erection of a cattle guard and gateway across any highway or section line also has authority to cause the same to be removed, if the same is not kept in repair, or if in the judgment of said board, it becomes necessary to remove the cattle guard and gateway for the purpose of improving the highway or section line. If the board determines any cattle guard and gateway should be removed under this section, written notice by registered or certified mail must be sent to the occupant of the enclosure, notifying the occupant to effect such removal within thirty days from the date of mailing. If the notice is not complied with, the board, upon expiration of the period, is authorized to remove or destroy the cattle guard and gateway.

24-10-05. County and townships exercise joint authority.

If the cattle guard and gateway provided for in section 24-10-01 are sought to be erected upon any township or county line, the governing boards of the adjacent territory shall exercise joint authority and jurisdiction and the proceedings required in section 24-10-02 must be taken in both jurisdictions.

24-10-06. Cattle ways under highways.

Upon application to the board of county commissioners of any county or the board of township supervisors of any organized township, by any person, for permission to construct a cattle way under any public road, such board may grant the same upon condition that the cattle way may not interfere with the public travel, that the grade of the road over the cattle way may not exceed one foot [.30 meter] in ten feet [3.05 meters], and that it may not obstruct watering at any running stream. The applicant shall construct the same at the applicant's own expense and is responsible for all damages that may arise from its construction or from failure to keep the same in repair.

24-10-07. Failure to keep cattle way in repair.

If the person on whose land a cattle way is constructed fails to keep the cattle way in repair, the overseer of highways shall make all necessary repairs and shall charge the expenses to the person who requested the way be constructed or to that person's assignee. Upon refusal by that person to pay, the county or township board in which the cattle way is situated shall recover the expenses in an action brought in the name of the county or township and the state's attorney shall prosecute the action. The money, when collected, must be expended in improving or repairing the public roads in the road district where the cattle way is constructed.

24-10-08. Board may prescribe regulations.

The board granting an application to construct a cattle way may prescribe such further regulations and specifications in the construction of such way as it may deem proper, not inconsistent with the provisions of sections 24-10-06 and 24-10-07.

CHAPTER 36-11
TRESPASS OF LIVESTOCK

36-11-01. Livestock running at large prohibited - Penalty.

No livestock may be permitted to run at large. Any owner or possessor of livestock who willfully permits the livestock to run at large through failure to maintain a lawful fence as provided in section 47-26-01, except in grazing area as provided in section 36-11-07, is guilty of a class B misdemeanor.

36-11-01.1. Livestock - Definition.

As used in this chapter, "livestock" includes bison, cattle, goats, horses, mules, sheep, and swine.

36-11-02. Owner defined.

In any action brought under the provisions of this chapter, any person occupying or cultivating lands is considered the owner thereof.

36-11-03. Establishment of stock district - Petition.

Repealed by S.L. 1953, ch. 219, § 1.

36-11-04. Duty of board of county commissioners when petition is filed - Territory within cities, villages, and irrigation districts excluded.

Repealed by S.L. 1953, ch. 219, § 1.

36-11-05. Revocation of resolution establishing stock district - Petition required - When stock district may be re-established.

Repealed by omission from this code.

36-11-05.1. Stock district termination.

Repealed by omission from this code.

36-11-06. Certain animals not to be permitted to run at large at any time - Penalty.

The owner or person in charge of any stallion, jack, boar, ram, bull, or any animal known to be vicious who negligently permits such animal to run at large is liable in a civil action to any person who is damaged, either directly or indirectly, by such violation for all damages resulting therefrom and is guilty of an infraction. The provisions of this section, however, do not prevent the keeping of any stallion, jack, bull, or ram with any herd or flock which is attended by a herder if such stallion, jack, bull, or ram is kept with such herd or flock by the herder.

36-11-07. Liability of owners of livestock injuring persons or property of others.

1. The owner or possessor of any livestock that inflicts damage or injury to:
   a. Motor vehicles or their occupants upon a public highway within a grazing area in which proper signs, approved by the director of the department of transportation, indicating limited liability are posted at a point adjacent to the highway not less than two hundred feet [60.96 meters] nor more than four hundred feet [121.92 meters] from the entrance of the highway into the grazing area and so posted as to be plainly visible to individuals approaching the entrance; or
   b. The crops or other property of another or trespasses upon the lands or premises of another, where the damaged or injured crops, property, lands, or premises are located within a grazing area, except as provided in section 36-11-09, is not liable to any person sustaining damages or injury.
2. For the purpose of this section, a "grazing area" means any area designated as a grazing area by a majority of the board of county commissioners, either upon the motion of one of the commissioners or upon presentation to the board of a petition signed by a majority of the real property owners and tenants in the area in which it is

proposed that a grazing area be established. A grazing area must be used primarily for the purpose of grazing livestock and enclosed by a fence or other suitable means.

3. Except as provided above, the owner or possessor of any livestock that inflicts damage to the crops or other property of another or which trespasses upon the lands of another, whether the lands are fenced or unfenced, is liable to the persons sustaining the injuries or to the owner of the lands for all damages suffered by the owner, together with the statutory costs of the action to recover damages, and a reasonable attorney's fee allowed by the court.

36-11-08. Trespass and injury to property - Liability of owner of trespassing goats, sheep, and swine.

Repealed by S.L. 1977, ch. 310, § 3.

36-11-09. Action permitted when livestock breaks through lawful fence.

Any person owning or having charge of any livestock that goes through, over, or under any lawful fence is liable for all resulting damages. Any livestock that goes through, over, or under a lawful fence is deemed trespassing livestock for the purposes of this chapter.

36-11-10. Trespassing livestock may be distrained - Notice to owner - Security for release.

1. The person suffering damages by reason of the trespass of any livestock may take up the offending livestock. The person suffering damages shall notify the owner, or the person in possession of the livestock at the time of the trespass, of the seizure of the livestock without unnecessary delay, if the owner or person in possession is known to the person suffering damages and is a resident of, and present within, the county in which the trespass occurred. The person suffering damages may retain the livestock in that person's custody until:
   a. The damages sustained by reason of the trespass and the costs in the action to recover the damages have been paid; or
   b. Good and sufficient security for the payment of the damages and costs is given, provided the security is approved by a district judge serving the county in which the livestock is taken up.
2. If the owner of the offending livestock elects to give security, the owner shall give to the person holding the livestock notice that security will be given and the date and hour when the security will be submitted to the district judge for approval. The notice must be given at least one day before the date set for the submission of the security to the judge. The cost of serving notices required under this section may be taxed as costs in the action.
3. Where applicable, the provisions of section 36-11-07 may be raised as an affirmative defense in any proceedings under this section, and the owner or person entitled to possession of the livestock may apply to a court of competent jurisdiction for the return of the livestock. If the court finds that the livestock has been wrongfully distrained, the person who causes the livestock to be wrongfully distrained is liable for all damages suffered by the owner or person entitled to possession of the livestock, together with the costs of the action and reasonable attorney's fees.

36-11-11. Procedure when security given.

When security for the payment of damages and costs is approved by the district judge, the judge shall issue an order directed to the person holding the livestock to deliver the livestock to the person entitled to the livestock, and the officer receiving the order shall take the livestock and deliver it to the person. The cost of the proceedings may be charged as a part of the costs in the action to determine the rights of the parties regarding the livestock distrained for the trespass.

36-11-12. Notice of damages to owner of livestock before action is commenced.

Before commencing any action for damages caused by the trespass of any livestock, the person sustaining damages, if the person knows to whom the livestock belongs and the owner is a resident of, and is present in, the county in which the trespass occurred, shall notify the owner, or the person having the livestock in charge, of the nature and extent of the damage.

36-11-13. When action for trespass of livestock must be commenced.

A party claiming damage for trespass of livestock under this chapter shall bring an action to recover the same within:

1. Sixty days after the infliction of the damage if the offending livestock have been distrained by the person who has been damaged and a lien is sought to be impressed upon livestock for the amount of damages.
2. Six years after the infliction of the damage if the offending livestock have not been distrained by the person who has been damaged and no lien is sought to be impressed upon the livestock for the amount of damages.

36-11-14. Procedure when keeper or owner of trespassing livestock is unknown.

If the person suffering damage because of the trespass of livestock which has been taken up under this chapter does not know the name of the owner or keeper of the livestock, the person may bring an action against an unknown defendant. In such case, service must be made by publication of a copy of the summons, with a notice attached, stating the nature of the action, in at least one issue of a legal newspaper if one is published within the county, and if not, by posting copies of the summons and notice in three public places within the county. The publication or posting must be made at least ten days before the date of the trial. If it appears on the trial of any action brought to recover damages arising from the trespass of livestock that the person named in the action and upon whom the summons was served is not the owner or person in charge of the offending livestock, the action must be dismissed as to that person, and service must be made, and the action must proceed, as in a case in which the name of the owner or keeper of the offending livestock is unknown.

36-11-15. Proof on trial of action for trespass of livestock.

Upon the trial of an action brought under this chapter, the plaintiff shall prove:

1. The amount of damage sustained by the plaintiff by reason of the trespass; and
2. If the plaintiff has distrained the livestock committing the trespass, the amount of expense incurred in distraining and keeping the livestock.

36-11-16. Judgment for plaintiff is lien on livestock.

Any judgment rendered for damages against the defendant in an action brought under this chapter is a lien upon the livestock committing the trespass if the livestock were distrained by the plaintiff, and the livestock may be sold as in other cases of sale of personal property on execution, and the proceeds of the sale applied to the satisfaction of the judgment, and the livestock are not exempt from seizure and sale upon execution.

36-11-17. Collection of judgment against unknown defendant - Disposition of surplus.

After a judgment has been rendered against an unknown defendant as provided in section 36-11-14, the livestock, or so many of them as may be necessary, must be sold in the same manner as personal property is sold upon execution. Any surplus remaining from the sale after the judgment and the costs in the action have been paid must be paid to the county treasurer for the benefit of the owner, and if the owner does not appear and claim the surplus within six months, it must be paid into the common schools trust fund for the use of the public schools.

36-11-18. When judgment of original court final - Right to trial by jury.

In all actions brought under this chapter, if the amount of damages claimed does not exceed twenty-five dollars, the judgment of the court having original jurisdiction is final. Either party to the action may have a jury trial upon demand.

36-11-19. Taking livestock distrained - Penalty.

Every person who, except by due course of law, takes, advises, or assists in the taking of any livestock distrained and held by virtue of this chapter, from the possession of the person having the livestock, without the consent of the person holding the livestock, is guilty of a class B misdemeanor.

36-11-20. Sheriff to return or impound livestock running at large - Expenses to be paid by owner.

In the event of a complaint by anyone suffering injury or damages or likely to suffer injury or damages as a result of livestock running at large contrary to section 36-11-01, the sheriff of the county in which the livestock may be found shall return the livestock to the owner or impound the livestock and dispose of them as estrays under chapter 4.1-75. The expenses incurred by the sheriff or the sheriff's agents in performing the duties required in this section must be paid by the owner of the livestock. If the owner cannot be found, the sheriff's expense must be recovered from proceeds remaining after the disposal of the livestock as estrays.

CHAPTER 47-26
PARTITION FENCES

47-26-01. Definition of legal fence.

The following shall constitute a legal fence:

1. Any fence four and one-half feet [1.37 meters] high, in good repair, consisting of rails, timber, boards, stone walls, or any combination thereof.
2. All brooks, rivers, ponds, creeks, ditches, or hedges.
3. All things which, in the judgment of the fence viewers within whose jurisdiction the fence may be, are equivalent to the things specified in subsections 1 and 2.
4. Any fence upon which the interested parties may agree.
5. A barbed wire fence consisting of at least three barbed wires with at least number twelve and one-half gauge wire, the wire to be fastened firmly to posts which shall be not more than twenty feet [6.10 meters] or not more than forty feet [12.19 meters] and three stays apart. The top wire shall be not less than forty inches [101.6 centimeters] high, the bottom wire shall be not more than sixteen inches [40.64 centimeters] above the ground, and no two adjacent wires shall be separated by more than sixteen inches [40.64 centimeters].
6. A wire fence consisting of five smooth wires with posts not more than two rods [10.06 meters] apart and with good stays not more than eight feet [2.44 meters] apart, the top wire being not less than forty-eight inches [121.92 centimeters] nor more than fifty-six inches [142.24 centimeters] and the bottom wire being not less than sixteen inches [40.64 centimeters] nor more than twenty inches [50.8 centimeters] above the ground.
7. An electrified fence consisting of:
   a. One smooth wire located twenty-six inches to thirty-two inches [66.04 centimeters to 81.28 centimeters] above the ground and posts no more than one hundred feet [30.48 meters] apart;
   b. Two smooth wires, with the top wire located at least twenty-six inches [66.04 centimeters] above the ground, the bottom wire located eight inches to ten inches [20.32 centimeters to 25.40 centimeters] below the top wire, and posts no more than one hundred feet [30.48 meters] apart; or
   c. Three smooth wires, with the top wire located at least twenty-six inches [66.04 centimeters] above the ground, the middle and bottom wires located eight inches to twelve inches [20.32 centimeters to 30.48 centimeters] apart, and posts no more than seventy-five feet [22.86 meters] apart.

47-26-02. Fence viewers.

In an organized township, the members of the board of township supervisors shall act as fence viewers.

47-26-03. Fence viewers taken from each township when a fence is on line between two townships.

When the line upon which a partition fence is to be made or divided is the boundary line between civil townships or is partly in one civil township and partly in another, a township supervisor shall be taken from each township affected when the services of fence viewers are required.

47-26-04. Fees of fence viewers.

Each township supervisor may be paid by the employing person at the rate of no more than fifteen dollars per day for the time employed as a fence viewer. If such person neglects to pay such fees within thirty days after the service is performed, the township supervisor may recover the amount thereof in a civil action.

47-26-05. Partition fences - Maintained by occupants and owners of land - Partition fence exceeding legal fence.

The occupants and the coterminous owners of lands enclosed with fences are mutually and equally bound to maintain the partition fences between their own and the next adjoining enclosures unless one of such owners chooses to let that owner's land lie open. If one of such occupants or owners shall require a partition fence which shall exceed the requirements for a legal fence, the occupant or owner who shall require such a fence shall bear the entire cost of erecting and maintaining such a fence unless both such occupants or owners shall otherwise agree.

47-26-06. Fences to be kept in repair throughout the year.

All partition fences shall be kept in good repair throughout the year unless the occupants of the lands on both sides thereof mutually agree otherwise.

47-26-07. Fence viewers may order partition fence maintained.

If any party neglects to repair or rebuild any partition fence which it is that party's duty to maintain, the aggrieved party may complain to the proper fence viewers, or a majority of them, who, after due notice to each party, shall proceed to examine the fence. If they determine that the fence is insufficient, they shall signify the determination in writing to the delinquent party, and direct that party to repair or rebuild the fence within such time as they deemed reasonable. If the fence is not repaired or rebuilt accordingly, the complainant may repair or rebuild the same.

47-26-08. Person rebuilding or repairing fence may recover expenses.

A complainant who has rebuilt or repaired a deficient fence as provided in section 47-26-07 may recover, from either the owner or the occupant of the land where the fence was deficient, the value of repairing or rebuilding the same and the fees of the fence viewers after:

1. The rebuilt or repaired fence has been adjudged sufficient by two or more of the township supervisors; and
2. The fence viewers have executed a certificate stating the value of repairing or rebuilding the fence and the amount of their fees.

Before bringing suit for such sum, however, the complainant shall make demand upon the owner or occupant who shall have one month after such demand within which to make such payment. If suit is commenced to recover such amount, the claimant shall recover interest upon the total sum stated in the certificate at the rate of one percent per month.

47-26-09. Fence viewers to settle controversy as to rights in fence and duty to maintain.

When a controversy arises relative to rights in a partition fence or the obligation to maintain the same, either party may apply to a majority of the proper fence viewers who, after notice to each party, may assign in writing to each person that person's share of the fence and direct the time within which each party shall erect or repair that party's share of the fence. If a party refuses or neglects to erect or maintain the part of a fence assigned to that party, the aggrieved party may erect or repair the fence and the value thereof shall be ascertained and recovered in the manner provided in section 47-26-08.

47-26-10. Party erecting all or more than just share of partition fence may recover.

If, in a controversy which has arisen between the occupants of adjoining lands as to their rights in a partition fence, it shall appear to the proper fence viewers that either of the occupants, before the making of a complaint, had voluntarily erected all, or more than that occupant's just share, of the fence or otherwise had become proprietor thereof, the other occupant shall pay for as much of the fence as shall be assigned to that occupant to repair and maintain. The amount that shall be paid to the aggrieved party shall be ascertained and recovered as provided in section 47-26-08.

47-26-11. Application to fence viewers to settle controversy when land is bounded by river or pond.

When lands of different persons which are required to be fenced are bounded or divided by a river, brook, pond, or creek and the occupant of the land on one side of the river, brook, pond, or creek refuses or neglects to join with the occupant of the land on the other side in making a partition fence on one side or the other of the river, brook, pond, or creek or if the occupants of the lands disagree respecting the fence, the parties may apply to two or more of the proper fence viewers to adjust the controversy.

47-26-12. Determination of fence viewers when land bounded by water - Notice - Liability of delinquent party.

The fence viewers to whom an application is made under section 47-26-11 shall proceed to view the premises described in the application forthwith. If such supervisors shall determine that the river, brook, pond, or creek is not, of itself, a sufficient fence and that it is impracticable, without unreasonable expense, to build a fence in the waters upon the true boundary line, they, after giving notice to the parties, shall determine whether the fence shall be erected and maintained on one side, or partially on one side and partially on the other side, of the river, brook, pond, or creek, and shall reduce to writing and sign their determination. If either party refuses to erect or maintain that part of the fence assigned to that party in the determination, the other party may erect and maintain the same and may recover the expense and costs in connection therewith ascertained in the manner provided in section 47-26-08.

47-26-13. Partition fence erected in body of water erected in equal shares.

When it is necessary to erect a partition fence in a body of water, such fence shall be built in equal shares unless it is agreed otherwise by the parties. If either party refuses or neglects to build or maintain that party's share of the fence, the other party may build or maintain the same and recover therefor in the manner provided in section 47-26-08.

47-26-14. Fencing of lands owned by different persons in severalty but occupied in common.

When lands belonging to different persons in severalty have been occupied in common by such persons without a partition fence between their respective lands and one of the occupants desires to occupy that occupant's part in severalty, that occupant may apply to a majority of the proper fence viewers:

1. If the other occupant or occupants shall refuse or neglect, upon demand, to divide with the applicant the line where the partition fence ought to be built, to divide such line and assign to the parties the parts thereof upon which each party shall build the fence; or
2. If the other occupant or occupants, when the line has been divided, shall refuse or neglect, upon demand, to build a sufficient fence upon the line assigned, to order such fence built.

Upon a division or assignment as provided in subsection 1, the fence viewers, in writing over their signatures, may assign a reasonable time for building the fence, having regard to the season of the year. If either party shall not build that party's part of the fence within the time assigned, the other party, after having completed that party's part thereof, may build the part assigned to the other party or parties and recover therefor the ascertained expense thereof, together with the fees of the fence viewers.

47-26-15. When partition fence removable.

When one party ceases to improve that party's land or opens that party's enclosure, that party may take away any part of the partition fence belonging to that party and adjoining the next enclosure unless the owner or occupant of the adjoining enclosure shall pay the sum determined by a majority of the proper fence viewers to be the value of the part of the partition fence belonging to the party who has ceased to improve that party's land or who has opened that party's enclosure. The determination shall be in writing and signed by at least two fence

viewers and the payment shall be made within two months after the value of the fence is ascertained.

47-26-16. Owner of unenclosed lands to pay value of fence when land is enclosed.

When unenclosed ground is enclosed, the owner or occupant thereof shall pay one-half of the value of each partition fence standing upon the line between that person's land and the enclosure of any other owner or occupant. If the parties do not agree on the value of the fence, it shall be ascertained by a majority of the proper fence viewers. Such determination shall be in writing and shall be signed by a majority of the fence viewers. If the owner of the unenclosed land refuses or neglects to pay for one-half of the value of the partition fence within sixty days after the value of the fence has been ascertained and demand made, the proprietor of the fence may maintain a civil action for such value and the cost of ascertaining the same.

47-26-17. If owner determines not to fence land, notice to adjacent landowners - Removal of partition fence.

If a person shall determine not to fence any of that person's lands adjoining a partition fence that has been divided according to the provisions of this chapter and shall give six months' notice of such determination to all the adjoining occupants of the lands, that person shall not be required to maintain any part of the fence during the time that person's lands are open, and that person thereafter may remove that person's portion of the fence if the owner or occupant of the adjoining enclosure will not pay the sum determined by the fence viewers to be the value of the fence in the manner provided in section 47-26-15.

47-26-18. Division of fences valid against parties to agreement and their heirs and assigns.

All divisions of fences or of the lines upon which partition fences are to be erected between unfenced land, which are made by the fence viewers in the manner provided in this chapter and recorded in the office of the recorder, and all such divisions which are made by the owners of adjoining lands in writing, witnessed by two witnesses, and signed and acknowledged by the parties making the division, and recorded in the office of the recorder, shall be valid against and binding upon the parties thereto and upon their heirs and assigns and all the succeeding occupants of the land, and they shall be obliged always thereafter to maintain their respective portions of the fence.

47-26-19. Fence viewers neglecting to perform duty - Penalty.

A township supervisor who unreasonably neglects to view a fence after having been requested to do so, or who refuses to perform any other duty required under the provisions of this chapter, shall forfeit the sum of five dollars and shall be liable to the party injured for all damages consequent upon such neglect.

47-26-20. Duty to maintain partition fence when lands enclosed for pasturage or grazing.

The provisions of this chapter shall apply to the respective occupants of lands which have been enclosed with fences for pasturage or grazing purposes.

CHAPTER 47-27
CLOSING FENCE GATES

47-27-01. Fence gates to be closed.

A person who opens a gate or bars in a fence enclosing farm premises shall not leave such gate or bars open unless that person is in lawful possession of the premises.

47-27-02. Private road not changed to public road.

Nothing contained in this chapter shall in any way change a private road through enclosed farm premises into a public road, nor take from a person in lawful possession of any premises the right to close any private road through such premises.

47-27-03. Violations - Penalty.

Anyone who shall violate the provisions of this chapter shall be guilty of a class B misdemeanor and, in addition, shall be civilly liable for any damages that may result, directly or indirectly.

LETTER OPINION
2008-L-16

Mr. James D. Gion
Hettinger County State's Attorney
PO Box 101
Regent, ND 58650-0101

Dear Mr. Gion:

Thank you for your letter asking who may act as fence viewers in unorganized townships. For the reasons stated below, it is my opinion that the law does not provide for fence viewers in unorganized townships. Consequently, parties to a partition fence dispute in an unorganized township must either work out the dispute themselves or apply to the district court for resolution of the dispute.

ANALYSIS

Your letter concerns fence viewers in unorganized[1] townships. As you note, N.D.C.C. § 47-26-02 provides that in organized townships, "the members of the board of township supervisors shall act as fence viewers." As you also note, N.D.C.C. ch. 47-26 does not explicitly make provision for fence viewers in unorganized townships.

Fence viewers generally exist to determine questions involving partition fences[2] and are often said to constitute a tribunal of limited jurisdiction with their duties and functions being judicial in nature.[3] Further:

> The powers of the fence viewers are determined by the statutes under which they act, and, dependent on the particular statute involved, fence viewers have power to pass on the necessity of a partition fence, to inspect an existing fence, to pass on the sufficiency of a fence, to determine the need

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[1] See N.D.A.G. 98-F-15 (unorganized or congressional township is a geographical area that is not a legal subdivision of the county for governmental purposes); N.D.A.G. 2000-L-46 (organized (civil) township only exists if the procedures of N.D.C.C. ch. 58-02 are followed; otherwise, territory constitutes a congressional or unorganized township and no township offices exist in an unorganized township).
[2] See N.D.C.C. § 47-26-05.
[3] 36A C.J.S. Fences § 32 (2003).

> for repairs or rebuilding, to fix the amount which shall be paid to the owner erecting or repairing the fence by the other owner, and to determine all controversies arising under the statutes relating to partition fences.[4]

North Dakota law provides for similar powers for fence viewers.[5]

Because the law is silent as to who may act as fence viewers in unorganized townships, you question whether county commissioners may take on that responsibility. This inquiry is certainly appropriate since there are a number of instances in North Dakota law where county commissioners act or have some particular duty with regard to unorganized townships.[6]

However, a county "may only exercise those powers specifically provided by law, or which are necessary to the exercise of the powers specifically provided by law."[7] For example, "a county commission may levy a tax in a dissolved civil township only if there is statutory

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[4] 36A C.J.S. Fences § 33 (2003) (footnotes omitted).

[5] See, e.g., N.D.C.C. § 47-26-07 (fence viewers may order partition fence maintained); N.D.C.C. § 47-26-09 (fence viewers may settle controversy as to rights in fence and duty to maintain); N.D.C.C. § 47-26-11 (fence viewers may settle controversy when land bounded by river or pond); N.D.C.C. § 47-26-12 (fence viewers may determine sufficiency of waterway as a fence); N.D.C.C. § 47-26-15 (fence viewers may determine whether a partition fence may be removed). See also N.D.A.G. 50-67 (when a landowner encloses his land, so that an adjoining landowner's partition fence becomes one side of his enclosure, he may then be compelled to share the original cost and pay his share of the upkeep of the partition fence).

[6] See, e.g., N.D.C.C. § 4-16-10 (board of county commissioners shall appoint person to destroy and exterminate gophers in unorganized townships upon petition of ten resident landowners); N.D.C.C. § 24-07-03.1 (surface owner may petition board of county commissioners in unorganized township to authorize improvement of section line for travel for agricultural purposes); N.D.C.C. § 24-07-04(1), (5) (proceedings to open or vacate highway must be brought to board of county commissioners if the road is situated, in whole or in part, in unorganized township); N.D.C.C. § 57-15-21 (board of county commissioners has same jurisdiction in unorganized township as board of township supervisors has in organized township for levying taxes for road and bridge purposes); N.D.C.C. § 57-15-22 (tax levied by board of county commissioners in unorganized township for construction and improvement of roads and bridges); N.D.C.C. § 63-05-01 (board of county commissioners in unorganized townships may designate land adjoining township highway to be mowed by adjacent landowners).

[7] N.D.A.G. 98-F-15 (citing Murphy v. Swanson, 198 N.W. 116, 119 (N.D. 1924)).

authority to levy that tax."[8] Thus, unless members of a board of county commissioners have specific authority to act as fence viewers in unorganized townships, they may not do so.[9]

As noted in an earlier opinion from this office:

> It must be presumed the Legislature says what it means. Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993). The law is what the Legislature says, not what is unsaid. Id. It is improper to construe a statute "so as to legislate that which the words of the statute do not themselves provide." Peterson v. Heitkamp, 442 N.W.2d 219, 221 (N.D. 1989). Therefore . . . the board of county commissioners cannot appoint its members as district overseers of highways in unorganized townships.[10]

I found no statute which directly or indirectly authorizes members of a board of county commissioners to act as fence viewers in unorganized townships. In N.D.C.C. ch. 47-26, dealing with partition fences and fence viewers, the only officials mentioned who may act as fence viewers are members of the board of township supervisors.[11] Had the Legislature intended to give county commissioners the authority to act as fence viewers in unorganized townships, it certainly could have provided for that as it had done in other contexts.[12] Thus, a statutory change would be necessary for county commissioners to act as fence viewers in unorganized townships.

Based on the foregoing, it is my opinion that the law does not provide for fence viewers in unorganized townships. Consequently, parties to a partition fence dispute in an

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[8] N.D.A.G. 98-F-15 (dissolution of a civil township results in transformation of an organized township into an unorganized township).

[9] See N.D.A.G. 98-L-107 ("State law does not authorize the board of county commissioners to appoint its members as district overseers of highways in unorganized townships."). State law was later amended in 1999 to specifically allow the board of county commissioners to appoint its members as district overseers of highways in unorganized townships. See 1999 N.D. Sess. Laws ch. 102, § 2 and N.D.C.C. § 24-06-14.

[10] See N.D.A.G. 98-L-107.

[11] See N.D.C.C. § 47-26-02 (members of board of township supervisors act as fence viewers in organized townships); N.D.C.C. § 47-26-03 (disputes involving partition fences in more than one civil township must utilize township supervisors from each affected township as fence viewers); N.D.C.C. § 47-26-04 (township supervisor paid fee as fence viewer); N.D.C.C. § 47-26-19 (township supervisor acting as fence viewer subject to penalty for failure to perform duty).

[12] See note 5.

unorganized township must either work out the dispute themselves or apply to the district court for resolution of the dispute.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[13]

[13] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

Hassan v. Brooks

Supreme Court of North Dakota

July 24, 1997, Filed

Civil No. 970025

Reporter
566 N.W.2d 822 *; 1997 N.D. LEXIS 154 **; 1997 ND 150

Carol Hassan, Plaintiff and Appellant v. Robert Brooks, Defendant and Appellee

Prior History: [1]** Appeal from the District Court for Ward County, Northwest Judicial District, the Honorable Glenn Dill, III, Judge.

Disposition: AFFIRMED.

Counsel: Mark R. Hays of Pringle & Herigstad, Minot, N.D., for plaintiff and appellant.

Todd L. Cresap of Kenner Sturdevant Peterson Cresap, Minot, N.D., for defendant and appellee.

Judges: Opinion of the Court by William A. Neumann, Justice. William A. Neumann, Mary Muehlen Maring, Dale V. Sandstrom, Gerald W. VandeWalle, C.J., James O'Keefe, S.J. O'KEEFE, James H., S.J., sitting in place of MESCHKE, J., disqualified.

Opinion by: William A. Neumann

Opinion

[*822] Neumann, Justice.

Carol Hassan appeals from the judgment on a jury verdict denying her recovery for damages to her motor vehicle after hitting cattle on North Dakota Highway 83. We affirm.

On October 21, 1993, Hassan was driving south on Highway 83 when her car hit cattle standing on the highway. She sued the owner of the cattle, Robert Brooks, for personal injury and property damage. Brooks counterclaimed **[**2]** for the loss of the value of the cattle. Hassan moved for partial summary judgment based on *N.D.C.C. § 36-11-07(3)*, arguing Brooks was strictly liable for the damages caused by his cattle. The district court denied the motion and the case proceeded to trial.

In December 1996, a jury trial was held. At trial, the district court instructed the jury to apply the negligence standard of care. The jury found neither party negligent. Hassan appeals.

Hassan argues the district court erred in denying summary judgment and applying a negligent standard of care. According to Hassan, *N.D.C.C. § 36-11-07* is controlling here. Under *N.D.C.C. § 36-11-07(1)*, a livestock owner is immune from liability when livestock, including cattle, inflict **[*823]** damage on a motor vehicle on a public highway in a designated grazing area. However, under *N.D.C.C. § 36-11-07(3)*, a livestock owner is liable for cattle that inflict "damage to crops or other property" outside a grazing area. *Section 36-11-07, N.D.C.C.*, states:

> "1. The owner or possessor of any horse, mule, head of cattle, sheep, goat, or swine, which inflicts any damage or injury to:
>
> a. Motor vehicles . . . within a **[**3]** grazing area . . . .
> * * *

> is not liable to any person sustaining such damages or injury.
> * * *
>
> 3. *Except as provided above*, the owner or possessor of any . . . head of cattle . . . which inflicts any damage to the crops or other property of another . . . *is liable* to the persons sustaining the injuries." (Emphasis added.)

Hassan argues the language "except as provided above," accompanied by "is liable," means livestock owners are strictly liable for any damage to a motor vehicle outside a grazing area. Because the damage to her automobile occurred outside a grazing area, Hassan argues Brooks is strictly liable for the damage caused to her vehicle.

Statutory interpretation is a question of law fully reviewable on appeal. *Heck v. Reed, 529 N.W.2d 155, 160 (N.D. 1995)*. The primary goal in construing a statute is to ascertain the legislature's intent. *Medcenter One, Inc. v. North Dakota State Board of Pharmacy, 1997 N.D. 54, 561 N.W.2d 634, 638, P 13*. To ascertain the legislative intent, we first look to the language of the statute. *Id.* When the language of a statute is ambiguous we may use extrinsic aids. *Nesdahl Surveying & Engineering,* **[**4]** *P.C. v. Ackerland Corp., 507 N.W.2d 686, 689 (N.D. 1993)*; *N.D.C.C. § 1-02-39*.

In *Hennenfent v. Flath, 66 N.W.2d 533, 536 (N.D. 1954)*, this Court first discussed whether *N.D.C.C. § 36-11-07*, formerly codified at N.D.R.C. § 36-1107, applied to automobiles. [1] In *Hennenfent*, the plaintiff, who had also collided with cattle on Highway 83, argued the defendant breached his statutory duty under N.D.R.C. § 36-1107. Section 36-1107, N.D.R.C., provided:

> "The owner or possessor of . . . cattle which shall inflict any damage to the *crops or other property of another* . . . shall be liable to the person sustaining the injuries or to the owner of the lands for all damages suffered by him . . . ." (Emphasis added.)

In deciding whether the livestock owner was liable for damage to a motor vehicle under the language "crops or other property of another," this Court determined motor vehicles were not a class the statute intended to protect. *Hennenfent, 66 N.W.2d at 536*. Instead, determining N.D.R.C. § 36-1107 was a herd law intended to protect the state's chief industries, cattle raising and agriculture, the Court held a livestock owner's duty to a motor **[**5]** vehicle fell outside the statute and should be measured under the rule of due care. *Id. at 537*.

In 1961, seven years after *Hennenfent*, the legislature amended *N.D.C.C. § 36-11-07*. In doing so, the legislature added a paragraph to the statute making livestock owners completely immune from liability when their livestock damage a motor vehicle in a designated grazing area. However, the legislature did not amend any other portion of the statute. *Section 36-11-07, N.D.C.C.* provided:

> "The owner or possessor of any horse, mule, head of cattle, sheep or swine, which shall inflict any damage or injury to motor vehicles or their occupants upon a public highway within a grazing area shall not be civilly liable to any person **[**6]** sustaining such damage or injury . . . .
>
> Except as hereinabove provided, the owner or possessor of any horse, mule, **[*824]** head of cattle, sheep or swine which shall inflict any damage to the crops or other property of another . . . shall be liable to the persons sustaining the injuries . . . ."

Legislative history suggests the amendment was intended to provide added protection to livestock owners by ensuring they had immunity for damage to motor vehicles in designated grazing areas. During a committee hearing, Senator William R. Reichert, speaking on behalf of S.B. 299 which was identical to H.B. 699, the actual bill passed that amended the statute, explained that the purpose of the amendment was to ensure that if a car hits a cow on a road through grazing land, the owner of the cow is not responsible or liable. Hearing on S.B. 299, before the Senate

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[1] The 1959 Legislative Assemply authorized republication of North Dakota's statutory law, correlating and integrating the 1943 Revised Code and its supplements into what became the North Dakota Century Code. Section 36-1107, N.D.R.C., was recodified at *N.D.C.C. § 36-11-07*.

Agricultural Committee, 37th Legislative Assembly, (February 8, 1961, statement of Senator Reichert.) Nothing in the legislative history indicates the legislature intended to make livestock owners strictly liable for damages to motor vehicles everywhere outside a grazing area, when it made them immune from liability inside a grazing **[**7]** area. We assume, in light of the legislative history and the fact that the legislature did not amend the language "crops or other property of another" to include motor vehicles, the legislature acquiesced in our interpretation that a negligent standard applies for damage to motor vehicles outside a grazing area. [2] *Effertz v. North Dakota Workers Compensation Bureau, 525 N.W.2d 691, 693 (N.D. 1994)*; *Wiederholt v. Director, North Dakota Dept. of Transp., 462 N.W.2d 445, 449 (N.D. 1990)* (stating "as the legislature has not amended the pertinent statute in this case to plainly disclose its intention contrary to our opinions, we adhere to our previous opinions").

[8]** We further note that eight years after that amendment, in *Matteson v. Polanchek, 164 N.W.2d 54, 56 (N.D. 1969)*, we reaffirmed the negligence standard of care for damage sustained on motor vehicles when we stated "if this were the usual case of a collision between an automobile and livestock upon an ordinary highway, . . . the question to be determined, of course, would be simply whether the defendant, as owner of the horse, was negligent in permitting it to escape onto the highway." A majority of other jurisdictions have also applied a negligence standard of care for damages to motor vehicles resulting from a collision with escaped animals. *See* 29 ALR 4th 431, § 10, 11 (reviewing caselaw and suggesting the majority view is that a negligence standard of care is applicable for damages to a motor vehicle resulting from a collision with an escaped animal).

In review of the statutory language, legislative history, and caselaw, we hold motor vehicles are not included under *N.D.C.C. § 36-11-07(3)*. We, therefore, affirm the district court's denial of summary judgment, allowing the case to proceed to trial as a negligence action.

William A. Neumann

[9]** Mary Muehlen Maring

Dale V. Sandstrom

James H. O'Keefe, S.J.

Gerald W. VandeWalle, C.J.

O'KEEFE, James H., S.J., sitting in place of MESCHKE, J., disqualified.

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[2] In 1977, *N.D.C.C. § 36-11-07* was again amended. Specifically, the legislature created subsections and subdivisions within the section. *Section 36-11-07, N.D.C.C.* (1977), was amended to state:

"1. The owner or possessor of any horse, mule, head of cattle, sheep, goat, or swine, which shall inflict any damage or injury to:

a. Motor vehicles . . . within a grazing area

* * *

shall not be liable to any person sustaining such damages or injury.

* * *

3. Except as provided above, the owner or possessor of any horse, mule, head of cattle, sheep, goat, or swine which shall inflict any damage to the crops or other property of another . . . shall be liable to the persons sustaining the injuries . . . ."

Hennenfent v. Flath

Supreme Court of North Dakota

October 30, 1954

No. 7405

Reporter
66 N.W.2d 533 *; 1954 N.D. LEXIS 107 **

C. E. HENNENFENT, Plaintiff and Appellant, v. Emanuel FLATH, Defendant and Respondent

Syllabus

[1]** *Syllabus by the Court*.

1. Questions of negligence and contributory negligence are questions of fact for the jury unless the evidence in the case is such that reasonable men can draw but one conclusion therefrom.

2. A party who seeks a recovery under the provisions of a statute must be within the class the statute was enacted to protect.

3. In an action for damages arising out of a collision between a motor vehicle and a domestic animal at large upon a public highway, the plaintiff's rights and the defendant's duties are to be measured by the rule of due care.

4. Whether defendant, whose cattle were at large upon a public highway, exercised reasonable care to confine them, held to be a question of fact for the jury.

5. Whether plaintiff, who passed an approaching car, beyond which he could not see because of glaring headlights, at a speed of 45 or 50 miles an hour and thereafter collided with an animal which entered the highway from behind the approaching car, was guilty of contributory negligence, held a question of fact for the jury.

6. An instruction as to the statutory requirements for headlights on motor vehicles without an instruction upon the statutory requirements **[**2]** for passing lights, is held, for the reasons stated in the opinion to be without prejudice.

7. Where the court in defining proximate cause to the jury, differentiates it from remote cause, the instruction is not erroneous even though there is no evidence of an intervening cause in the case.

8. Remarks by the trial court in connection with a ruling upon an objection to the reception of evidence which do not constitute a comment upon the credibility or weight to be given to evidence, but merely state what the record shows as to certain matters, are not error if the statements of the court are accurate.

Counsel: Ella Van Berkom, Minot, for appellant.

Robt. Vogel, Garrison, for respondent.

Judges: MORRIS, C. J., and SATHRE and GRIMSON, JJ., concur.JOHNSON, J., did not participate.

Opinion by: BURKE

Opinion

[*535] BURKE, Judge. This action arose out of a collision between a motor vehicle driven by the plaintiff and an animal owned by the defendant. The collision occurred upon a public highway. In his complaint the plaintiff alleged that defendant, negligently, and in violation of the laws of the State of North Dakota, permitted cattle owned by him to run at large and that such negligence **[**3]** proximately caused injury and damage to the plaintiff's automobile in the sum of $ 549.92. He asked for judgment in that amount. Defendant answered denying any negligence on his part, alleging contributory negligence on the part of the plaintiff and counterclaiming for the value of the animal struck and killed by plaintiff's car. The issues in the case were tried to a jury and a verdict was returned for a dismissal of the action. Thereafter plaintiff moved for a new trial. This motion was denied and plaintiff has appealed from the order denying the motion.

There are five specifications of error. We shall first consider the specification that the verdict and judgment are contrary to the evidence. Upon this specification plaintiff's contention is that both defendant's negligence and lack of contributory negligence on the part of the plaintiff were established by the evidence as a matter of law.

The collision occurred upon Highway 83 at about 8:30 P.M. on the 8th of April at a point about a mile to a mile and a half south of Coleharbor. In this vicinity the course of the highway is parallel to the right of way of the Soo Railway and runs generally from northwest to southeast. **[**4]** The right of way is southwest of the highway. Defendant's land abuts the railroad right of way on the southwest and is separated from it by a right of way fence. In order to reach his land from Highway 83, it was necessary for defendant to cross the railroad right of way. In the winter preceding the collision defendant's customary way **[*536]** of entry across the tracks had been blocked by snow and he had secured permission from the railway company to use an emergency crossing at a point where there was a wooden gate in the right of way fence. Defendant removed this wooden gate. He said he replaced it with a wire gate which he kept closed. On the other hand Melvin Thorson, the section foreman in charge of right of way maintenance, stated that he never saw the wire gate and that there was no wire gate at the time he replaced the wooden gate after defendant's regular entry across the tracks was reopened.

Immediately prior to the collision plaintiff was traveling upon the highway in a southeasterly direction at a speed, according to his testimony, of 45 or 50 miles per hour. It was dark and the bright lights of the car were lighted. His testimony is that a car approached **[**5]** from the opposite direction with glaring headlights which made it impossible for him to see beyond it, that he dimmed his headlights and diminished his speed as the two cars neared each other, that just as the other car passed he saw two animals coming across the road from his left, 'from behind the other car'. He missed the first animal but struck the second one which he said was only 30 to 40 feet away from him when he first saw it. He said, 'I didn't have an opportunity to avoid hitting it and I was afraid I would turn the car over so I killed the car down and let it slide right along. There was a fellow behind me and I was afraid he might hit me.' The skid marks left by plaintiff's car on the highway were 116 feet long and plaintiff estimated that his car traveled about 80 feet after striking the animal. None of the persons riding in plaintiff's car were injured. There is no question but that the animals belonged to the defendant.

It was plaintiff's theory that the cattle left defendant's pasture by way of the gate in the right of way fence. Defendant, however, testified that the tracks of the animals in the snow showed where they went through the fence. This fence was **[**6]** woven wire at the bottom, topped by three strands of barbed wire. Defendant said that at the place where the animals' tracks were, the woven wire had sagged and the barbed wire was loose. It was his theory that the cattle had 'crawled' through the fence in the space between the woven wire and the first strand of barbed wire. He said that 12 animals had got out of the pasture, while plaintiff said there were 15 to 20 out on the highway. Defendant stated that he had not inspected the fence prior to this occasion. He said, 'It was early in the spring yet and I never went around to fix the fences.'

Upon this record are negligence on the part of the defendant and absence of contributory negligence on the part of the plaintiff established as a matter of law? We think not. Questions of negligence and contributory negligence are questions of fact for the jury unless the evidence is such that reasonable men can draw but one conclusion therefrom. *Amstrong v. McDonald, 72 N.D. 28, 4 N.W.2d 191*; *Fagerlund v. Jensen, 74 N.D. 766, 24 N.W.2d 816*; *Pachl v. Officer, N.D., 54 N.W.2d 883*.

Plaintiff asserts that defendant's negligence arises out of a breach of a statutory duty. Section 36-1101, **[**7]** NDRC 1943, provides: 'No cattle, horses, mules, swine, goats, or sheep shall be permitted to run at large' except under certain conditions which do not exist in this case. Section 36-1107, NDRC 1943, provides: 'The owner or possessor of * * * cattle which shall inflict any damage to the crops or other property of another * * * shall be liable to the person sustaining the injuries or to the owner of the lands for all damages suffered by him * * *.' These sections are part of the 'Herd Law' as it appears in the 1895 Code. From the time at which this law was enacted, and the provisions of the act generally, we are satisfied that its purpose was to protect the state's chief industries, cattle raising and agriculture. It is a general rule that a party seeking to recover damages under such an act must be within the class the statute was enacted to protect. *Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277, 45 A.L.R. 498*; *Fox v. Koehnig, 190 Wis. 528, 209 N.W. 708, 49 A.L.R. 903*; *Sidle v. Baker, 52 Ohio App. 89, 3 N.E.2d 537*; **[*537]** *Champlin Refining Co. v. Cooper, 184 Okl. 153, 86 P.2d 61*. A traveler upon a highway therefore has no cause of action by virtue of the 'Herd Law' but his **[**8]** rights and the defendant's duties are to be measured by the rule of due care. *Hansen v. Kemmish, supra*; *Fox v. Koehnig, supra*; *Texeira v. Sundquist, 288 Mass. 93, 192 N.E. 611*.

The question then is: Did defendant exercise ordinary care to prevent his cattle from running at large? There is proof that there was a weak spot in an otherwise substantial fence through which the cattle emerged from the pasture. There is proof that defendant turned his cattle into the pasture without first inspecting the fence. There is nothing in the evidence to show that defendant at that time knew or had reason to believe that the fence was defective. In these circumstances we are satisfied that the question of whether he exercised reasonable care was one for the jury. *Traill v. Ostermeier, 140 Neb. 432, 300 N.W. 375*; *Eixenberger v. Belle Fourche Livestock Exchange, S.D., 58 N.W.2d 235*.

Upon the question of whether the plaintiff exercised reasonable care, plaintiff himself testified that he passed an approaching automobile beyond which he could not see at a speed of 45 to 50 miles an hour; that at the moment he passed beyond the glare of the approaching car's headlights he saw the cattle upon the **[**9]** highway in his lane of traffic about 40 feet ahead of him, too late to avoid a collision. It is undisputed that the cattle came upon the highway from the side of the road opposite to plaintiff's lane of travel. To reach the spot where plaintiff first saw the animal he struck, it would have been necessary for the animal to come out of the ditch adjoining the highway and walk across the northeast lane into the southwest lane after the approaching car had passed. It is highly improbable that the cattle would have traveled such a distance while the fast moving approaching car was traveling but 40 feet. The jury might well have found that plaintiff's estimate as to the distance between his car and the cattle at the time the two cars passed each other was substantially inaccurate. Plaintiff claims that there is no evidence of negligence because he was not exceeding a speed limit of 50 miles an hour. Merely keeping within the speed limit does not absolve a driver of an automobile of negligence. The statute, Section 39-0901, NDRC 1943, provides: 'Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having **[**10]** due regard to the traffic, surface, and width of the highway and any other conditions then existing.' In view of all the circumstances we are of the opinion that reasonable men could have concluded that the failure of plaintiff to reduce his speed below the admitted rate at a time when he was 'blinded' by the glare of approaching headlights was not the exercise of reasonable care and that such lack of care contributed proximately in some degree to cause his damage. The question of contributory negligence was therefore one for the jury. See *Ott v. Tschantz, 239 Wis. 47, 300 N.W. 766*.

In addition to his challenge to the sufficiency of the evidence, plaintiff has also specified as error certain of the trial court's instructions and comments.

The trial court instructed the jury:

'Every motor vehicle operating on a highway during a period from a half hour after sunset to a half hour before sunrise shall be equipped with two head lamps arranged and adjusted so that they will under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead.'

Plaintiff does not say that the foregoing instruction is **[**11]** not a correct statement of the law, but that the instruction was not applicable to the facts of the case and could have confused the jury to his prejudice. Plaintiff testified that at the time the collision occurred he was driving with his headlights dimmed and that his clear view **[*538]** was but 100 feet ahead. He had just passed a car traveling in the opposite direction and did not have time to elevate the beam of his headlights before the accident.

Section 39-1004, NDRC 1943, provides:

'Whenever a motor vehicle meets another motor vehicle on any highway, the operator, at a distance of not less than 500 feet, shall tilt the beams of the head lamps downward * * * lamps shall give sufficient illumination under normal atmospheric conditions to render clearly discernible and on a level road a person seventy-five feet ahead, * * *.'

There was no mention of the foregoing statute in the instruction and there was no request for an instruction in connection therewith.

The instruction which was given should not have been given because the adequacy of plaintiff's lights was not at issue in the case. However, we do not see how the giving of the instruction could have confused the **[**12]** jury or how it could have been prejudicial to the plaintiff. Plaintiff had testified that he could see clearly 200 feet with his bright lights on and 100 feet with his lights dimmed. Thus the only evidence in the case was that plaintiff's bright lights conformed to the law as laid down by the court. We cannot assume that the jury was unaware of facts that are common knowledge today, to wit: that all automobiles are equipped with devices to depress the beams of headlights, and that both law and courtesy require the use of such devices by operators of vehicles which approach each other in the nighttime from opposite directions. We believe the jury could not but understand that plaintiff's use of dimmers which reduced his clear vision to a distance of 100 feet ahead was not only permissible but was required by law. The instruction therefore could not have been prejudicial.

The second instruction specified as error is as follows: 'The proximate cause of any injury is that which causes it directly or immediately, or through a natural sequence of events, without the intervention of another unforeseen independent and efficient cause. The fact that the injury would not have happened **[**13]** but for the act does not necessitate the conclusion that such act was the proximate cause of the injury. Where a person is negligent in some respect and between his negligence and the injury an entirely, unrelated and unforeseen cause intervenes, the second is generally regarded as the proximate cause and the first as the remote cause.' Plaintiff objects to this instruction, 'because there is no evidence of an intervening independent and efficient cause.' At this point in the instructions the court was not delineating the issues in the action, but was defining the legal significance of the words 'proximate cause'. We can find no fault with his attempt to make the definition more clear by drawing a contrast between proximate cause and remote cause.

The third instruction specified as error was that submitting the issue of contributory negligence to the jury. What we have already said in this opinion concerning contributory negligence disposes of this specification.

Lastly, plaintiff asserts that the court erred in commenting on the evidence. The transcript shows the following:

'Mr. Vogel: Q. During the period when his regular road was out and you said there was no gate there, **[**14]** did you see any of Mr. Flath's cattle out? A. No.

'Miss Van Berkom: I move to strike that answer so I can make an objection.

'The Court: Strike it out.

'Miss Van Berkom: That is objected to on the grounds it is incompetent, irrelevant and immaterial, no bearing on the issues in this lawsuit, and not within the issues.

'Mr. Vogel: If the court please, the apparent purpose is to show if the cattle were out.

'The Court: I think I will sustain the objection. If I remember it the **[*539]** defendant denied his cattle were around, and this would be a collateral issue. I don't think there is any proof that they had been running around except this one time they were out.'

The remarks of the trial court last above quoted are asserted to be error. These remarks do not constitute a comment on the testimony in the objectionable sense in that they comment upon the credibility or weight to be given to testimony. They merely state what the record showed as to certain matters. If the statement of the court was accurate, and it is not challenged on that ground, it was not error. 53 Am.Jur., Trial, Sec. 79, p. 78; 64 C.J., Trial, Sec. 100, p. 97.

Since we find no prejudicial error in **[**15]** the record the judgment of the district court is affirmed.

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Kubik v. Hauck

Supreme Court of North Dakota

December 8, 2022, Filed

No. 20220091

Reporter
2022 ND 217 *; 982 N.W.2d 599 **; 2022 N.D. LEXIS 219 ***; 2022 WL 17491451

Scott Kubik, Plaintiff and Appellant v. Dominic Hauck, Defendant and Appellee

Notice: THIS OPINION IS SUBJECT TO PETITION FOR REHEARING AND CANNOT BE CONSIDERED FINAL UNTIL DISPOSITION OF SUCH PETITION FOR REHEARING BY THE COURT OR EXPIRATION OF 14 DAYS FROM THE FILING DATE.

Prior History: **[***1]** Appeal from the District Court of Dunn County, Southwest Judicial District, the Honorable Rhonda R. Ehlis, Judge.

Disposition: AFFIRMED.

Counsel: Jordan L. Selinger, Dickinson, N.D., for plaintiff and appellant.

Sandra K. Kuntz, Dickinson, N.D., for defendant and appellee.

Judges: Jon J. Jensen, C.J., Gerald W. VandeWalle, Daniel J. Crothers, Lisa Fair McEvers, Jerod E. Tufte.
Opinion of the Court by Tufte, Justice.

Opinion by: Jerod E. Tufte

Opinion

[600]** **Tufte, Justice**.

[*P1] Scott Kubik appeals from a judgment quieting title in favor of Dominic Hauck on a property line dispute and denying his claim of acquiescence. We affirm, concluding the district court did not clearly err in finding that Kubik failed to show by clear and convincing evidence that Hauck or his predecessors in interest recognized the original fence line as the property line.

[601]** I

[*P2] Kubik and Hauck are adjacent landowners. Kubik owns the SW1/4 of Section 2, Township 141 North, Range 95 West in Dunn County, which he purchased in 1997 from his mother and has been owned by his family since 1911. Hauck owns the NW1/4 of Section 2, which he purchased at auction in 2018 from the Tony Sickler Trust. Prior to the Trust's ownership, the Sickler family had owned the NW1/4 since the 1930s. A wire **[***2]** fence ran east and west near the property line. After a survey of his land, Hauck discovered the fence was several feet inside of his property. Hauck removed the original fence and built a new fence consistent with the property line identified by the survey.

[*P3] In 2020, Kubik sued Hauck to quiet title in the strip of land located on the south side of the original fence line (i.e., the land between the original fence line and the new fence line) under adverse possession and acquiescence, and for trespassing and damaging his property. Hauck counterclaimed to quiet title in the disputed property. After a

bench trial, the district court quieted title in favor of Hauck based on the survey showing that he is the rightful owner and rejected Kubik's claims of adverse possession, acquiescence, trespass, and damages.

II

[*P4] "In an appeal from a bench trial, the district court's findings of fact are reviewed under the clearly erroneous standard of review, and its conclusions of law are fully reviewable." *McCarvel v. Perhus, 2020 ND 267, ¶ 9, 952 N.W.2d 86*. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all of the evidence, this Court is convinced **[***3]** a mistake has been made." *Id.* The district court is the determiner of credibility issues in a bench trial, and we will not second-guess its credibility determinations. *Id.*

III

[*P5] Kubik argues the original fence line was the established boundary between his property and the Hauck/Sickler property and the district court erred by not quieting title in his favor under the doctrine of acquiescence.

[*P6] "Boundary by acquiescence allows a property owner to acquire neighboring property due to an honest mistake over the location of the boundary line." *McCarvel, 2020 ND 267, ¶ 10, 952 N.W.2d 86* (quotation omitted). "To establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation." *Id. at ¶ 11*. "A boundary line acquiesced in must be definite, certain and not speculative, and open to observation." *Id.* "[A]cquiescence requires possession up to a visible line marked clearly by monuments, fences, or the like." *Id.* "In the absence of a conventional agreement, mutual recognition may be inferred from a party's conduct or silence." *Id.* Whether there has been mutual recognition of a boundary **[***4]** is a question of fact, reviewed under the clearly erroneous standard. *Id. at ¶ 9*.

[*P7] The district court found that the original fence was merely a barrier between the properties, not a mutually recognized boundary. The court found that Kubik honestly believed the original fence to be the actual boundary, but that Kubik failed to show by clear and convincing evidence that the Sicklers, the Trust, or Hauck recognized the original fence line as the boundary for the required 20 years. **[**602]** The court noted that the testimony showed that "no one really knows who owns the [original] fence, as both parties have appeared to work on it over the years," including maintenance by Kubik, the Sicklers, and renters of both properties. The court found that the Sicklers had moved the fence posts over the years due to erosion, and that the fence was a barrier to contain cattle and horses. The court noted that the evidence showed the fence was in disrepair. It found that the disputed property was conservation reserve program (CRP) land and pasture land, and that the CRP land was hayed every third year and that animals, at times over the years, had been pastured on the land. The court found that no improvements had been **[***5]** made to the land by Kubik, and that it does not appear Kubik and the Sicklers ever discussed the boundary line. Hauck's land surveyor, who was certified as a surveying expert at trial, opined that the original fence was built in the 1940s. Alfred Sickler, a trustee of the Tony Sickler Trust since 2016 and Tony Sickler's son, testified that the Trust paid the property taxes on the NW1/4 until it was sold to Hauck and that prior to selling, the Trust advertised all 160 acres in the NW1/4 for sale. Alfred Sickler testified the full 160 acres were sold to Hauck. Hauck testified that he believed the Trust paid taxes on the full 160 acres in 2018 and he and his wife paid taxes the following years.

[*P8] Kubik contends that the original fence was the mutually recognized boundary and that the Sicklers' moving of the fence posts was to maintain its line, not to shift it north or south. Alfred Sickler testified that he and his family maintained the fence and moved posts to "try to stay in line with where the fence was at, but . . . if the sand got too deep or [you] couldn't dig a post hole, you just moved it over maybe just one post or two posts." He testified he did not view the fence as a boundary. **[***6]** Bobby Kubas, who rented the NW1/4 from the Trust from 2014 through 2018, testified he performed extensive maintenance on the fence in 2014, replacing posts and wire, to contain his cattle. Kubas testified he was required to maintain the fences under his lease agreements with the Trust. On the basis of the evidence, the court may reasonably infer that the Sicklers and the Trust did not regard the fence line as the boundary line, but merely a barrier to contain cattle.

[*P9] Kubik argues the Sicklers' use and maintenance of the fence shows they did not object to the fence's location or demand it be moved. While the parties' conduct or silence may lead to an inference that they mutually recognized a fence as a boundary under certain circumstances, a permissible inference in this case is that they merely regarded it as a barrier to contain cattle. *See* Sauter v. Miller, 2018 ND 57, ¶ 21, 907 N.W.2d 370 ("A property owner does not acquiesce in a fence as a boundary merely because he builds the fence upon his own property and not upon the property line. . . . The intent must have been to establish the fence as the boundary, not a mere barrier between the properties."); Brown v. Brodell, 2008 ND 183, ¶¶ 14-16, 756 N.W.2d 779 (concluding district court did not clearly err in finding no mutual recognition **[***7]** of boundary because, in part, party opposing acquiescence paid property taxes on disputed acreage and evidence showed prior owner constructed fence as a barrier to keep cattle contained). Accordingly, the district court did not clearly err in finding that Kubik failed to show by clear and convincing evidence that the Sicklers, the Trust, or Hauck recognized the original fence line as the boundary.

[*P10] Kubik asserts the telephone easement given by the Trust was erroneously **[**603]** relied upon by the district court in denying his claim of acquiescence. The court found that the Trust gave Consolidated Enterprises an easement on the NW1/4 and stated, "It is apparent that Consolidated believed the Sicklers to be the owners of the property where the easement lies, as it would be improbable that they would pay someone for an easement that did not have the authority to grant the easement." The court did not make a specific finding as to where the easement is located on the NW1/4. However, even if we agree with Kubik that the easement is not located on the disputed property, the court's findings regarding the telephone easement are not reversible error. The court did not misstate the evidence. Rather, **[***8]** Kubik interprets the court's findings as implicitly stating that the telephone easement was on the disputed property and that provides evidence of a lack of mutual recognition of a boundary. To the extent the court implied the easement was located on the disputed property, the court does not appear to rely on this information in any material way. We conclude that either the court did not rely on this information or, if it did, the court's ultimate finding that there was no mutual recognition of a boundary is not clearly erroneous. *See* Gimbel v. Magrum, 2020 ND 181, ¶ 13, 947 N.W.2d 891 ("Appellate courts review the record and findings as a whole and if the controlling findings are supported by the evidence, they will be upheld on appeal notwithstanding immaterial misstatements in the lower court's decision.").

[*P11] Kubik compares this case to Ward v. Shipp, 340 N.W.2d 14 (N.D. 1983), and Sauter, 2018 ND 57. In both Ward and Sauter, this Court concluded the district court did not clearly err in finding the parties mutually recognized a fence as a boundary under the doctrine of acquiescence. While the basic facts in this case are similar to Ward, the Court in Ward, at 16, summarily concluded that there was "sufficient evidence in the record" to support the district court's finding that the fence was intended by the parties **[***9]** "to be the boundary between the properties, not merely a barrier."

[*P12] In Sauter, 2018 ND 57, ¶ 12, 907 N.W.2d 370, the plaintiff-landowner bringing the acquiescence claim testified that "the fence has always been recognized as a boundary line." The defendants "did not offer any disputing evidence or call any previous owners to testify to the contrary." *Id.* Further, although the defendants "testified they did not think the fence was the proper boundary when they visited the property prior to purchasing the land from the [previous owners] . . . [they] still purchased the land, did not have the acreage surveyed, and entered into a lease with [plaintiff] that contained language denoting the fence as part of the [plaintiff's] property." Id. at ¶ 22. Unlike here, the plaintiff in Sauter met her burden in showing the fence was a mutually recognized boundary.

[*P13] Even if we were to conclude the facts in this case were similar enough to Ward or Sauter as to allow for a finding of mutual recognition of boundary and acquiescence in the first instance, our task as an appellate court is to determine whether the district court *clearly erred* in finding a lack of mutual recognition of boundary and acquiescence. *See* Gimbel, 2020 ND 181, ¶ 14, 947 N.W.2d 891 (concluding that although conflicting evidence existed **[***10]** on the issue of acquiescence, the district court is the determiner of credibility issues, and evidence existed supporting court's finding of a lack of mutual recognition). As discussed above, the court did not clearly err in finding that Hauck and his predecessors in interest did not recognize the original fence line as the property line.

[604]** IV

[*P14] Kubik asserts the district court erred by failing to award damages for Hauck trespassing upon his land and cutting a portion of his hay. The court found that Hauck mowed a small strip of grass on Kubik's land, but that Kubik failed to show that he incurred any damages. Although the court should have awarded nominal damages, its failure to do so does not warrant reversing the judgment. *Kuntz v. Leiss, 2020 ND 253, ¶ 7, 952 N.W.2d 35*.

[*P15] We have considered the parties' remaining arguments and conclude they are either without merit or unnecessary to our decision. The judgment is affirmed.

[*P16] Jon J. Jensen, C.J.

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