No. SC 84527

IN THE SUPREME COURT OF MISSOURI

FLOYD J. SILL and BILLYE SILL,

Appellants,

vs.

BURLINGTON NORTHERN RAILROAD AND SANTA FE RAILWAY COMPANY,

Respondent.

Appeal from the Circuit Court of Greene County
No. 100CC0236 – Honorable Don E. Burrell

SUBSTITUTE BRIEF FOR RESPONDENT

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Dated: August 26, 2002

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SUBSTITUTE BRIEF FOR RESPONDENT

STATEMENT OF FACTS

This action was filed by Plaintiffs-Appellants Floyd J. Sill and Billye Sill (the "Plaintiffs"), arising out of personal injuries Mr. Sill suffered when a vehicle he was driving struck a horse on U.S. Highway 60 in Webster County, Missouri. Legal File ("L.F.") 11 ¶ 10.

Plaintiffs sued several defendants. Plaintiffs' Third Amended Petition claimed that Defendants Michael W. Burks, Bonnie Burks, and Melissa A. Towe owned or controlled real estate in Webster County, on which the horse had been pastured, and owned or controlled the horse, and that "the fence or enclosure [in which the horse was pastured] was insufficient to contain the livestock and that the Defendant[s] permitted the livestock to run at large outside the enclosure," resulting in the collision. L.F. 11 ¶¶ 7-8; L.F. 12-13 ¶¶ 14-15; L.F. 8 ¶¶ 29-30.

In Count III, Plaintiffs' suit also named Defendant-Respondent The Burlington Northern Railroad and Santa Fe Railway Company ("BNSF"). With respect to BNSF, the Third Amended Petition alleges the following:

> 21. Defendant [BNSF] owned and maintained a railroad line in Webster County, Missouri near U.S. Highway 60 approximately four-tenths of a mile west of the intersection of Highway 60 with Route U and that pursuant to § 389.650 said Defendant was required to maintain and erect lawful fences along the railroad right-of-way.
>
> 22. That said Defendant did own and maintain a fence adjacent to real estate owned by Michael W. Burks and that the real estate owned by Michael W. Burks contained livestock.

23. That the fence owned by Defendant was damaged, in disrepair or inadequately built and as a result thereof livestock that had been on the land owned by Michael W. Burks escaped through the fence belong to [BNSF] and in the early morning hours of April 1, 1999 said livestock was on the traveling portion of U.S. Highway 60 at the location described above and a vehicle driven by the Plaintiff collided with the livestock causing injury described below.

L.F. 14-15. The Third Amended Petition further alleges that BNSF was negligent in failing to erect an adequate fence, and in failing to inspect, maintain, and repair the fence. L.F. 15-16 ¶ 24.

BNSF moved to dismiss Count III of Plaintiffs' Third Amended Petition. L.F. 20. The Circuit Court granted BNSF's Motion in an order entered April 2, 2001. L.F. 30. The Court's Order finds:

1. Section 389.650 RSMo. creates a duty for [BNSF] to erect and maintain a lawful fence along its right-of-way through cultivated fields and unenclosed lands.

2. That duty is for the benefit of adjoining landowners and for those persons lawfully traveling along the railroad's right-of-way.

3. Plaintiffs are outside the class of persons intended to benefit from the protection provided by the statute.

4. Any failure by [BNSF] to maintain a lawful fence pursuant to Section 389.650 RSMo. cannot be considered the proximate cause of injuries which occur outside the railroad's right-of-way.

> WHEREFORE, the motion to dismiss of defendant [BNSF] is granted. Count III of Plaintiffs' Third Amended Petition is hereby dismissed with prejudice to the refiling of the same.

L.F. 30.

Plaintiffs moved for reconsideration, and for leave to file a Fourth Amended Petition, to allege BNSF's common-law liability, and that BNSF had notice of the allegedly defective fence. L.F. 31, 45. In an order entered May 15, 2001, the Court denied reconsideration and leave to file the amended pleading against BNSF. L.F. 44. With respect to Plaintiffs' Motion for Leave to File a Fourth Amended Petition, the Court's Order finds:

> the common law claim of negligence against [BNSF] in the proposed Fourth Amended Petition suffers from the same inability to demonstrate proximate cause as the count previously dismissed by the Court and is hereby rejected.

Id.

Plaintiffs appealed to the Missouri Court of Appeals for the Southern District.[1] In an Opinion issued on April 30, 2002, the Court of Appeals reversed and remanded. Although the Court implicitly recognized that Appellants could not state a viable claim for negligence *per se* under § 389.650, the Court held that Appellants could proceed "on a common law negligence theory." Op. at 13. The

[1] Although Plaintiffs' claims against the other Defendants remain pending, the Circuit Court entered an Amended Judgment in which it determined "that there is no just reason for delay [with respect to its ruling dismissing BNSF] and this Judgment is designated as final for purpose[s] of appeal." L.F. 60. *See* Supreme Court Rule 74.01(b).

Court began its analysis of the duty issue by stating that "existence of a duty is normally based on foreseeability that the conduct complained of might lead to the injury suffered. If the injury is foreseeable and the conduct occurred, the duty has been breached." Op. at 7-8 (citation omitted). The Court then discussed a series of cases decided under the railroad fencing statute, including *Theener v. Kurn*, 235 Mo. App. 823, 146 S.W.2d 647 (W.D. 1940), which had *denied* recovery to an animal owner where – as Plaintiffs allege here – the animal had escaped onto the railroad's right of way and from there onto a public highway, where it was struck by a car. Op. at 9-12.

Although the Court of Appeals acknowledged that *Theener* involved "a collision very similar to the one in the case at bar," Op. at 11, *and Theener found no duty in these "very similar" circumstances*, the Court of Appeals concluded that the principles recognized in *Theener* supported its recognition of a common-law duty:

> We believe that although there is not a specific case in a negligence cause of action finding a duty of the railroad to a motor vehicle driver for an injury on a public highway because of a claim of the negligent maintenance of a fence, in following the *Theener* and progeny reasoning we must conclude that § 389.650 does not preclude a duty to Appellants and those who sustain injuries outside of the railroad right-of-way. Here, based primarily on the concepts explained in *Theener* and *Lins v. Boeckeler Lumber Co.*, 299 S.W. 150 (Mo. App. 1927) [a case involving the liability of *a livestock owner* for animals roaming at large], it would be foreseeable to Respondent that failure to exercise reasonable care in the maintenance of the fence along its right-of-way could lead to an animal proceeding onto the track, traveling beyond the right-of-way, and colliding with an automobile on a nearby public highway. *See Theener*, 146

S.W.2d at 650; *Lins*, 299 S.W. at 150. The same principles apply to a claim of violations of the statutory duty as to a violation of a duty imposed under the general principles of law. *Vintila* [*v. Drassen*], 52 S.W.3d [28,] 39 [(Mo. App. S.D. 2001)].

Op. at 12.

The Court of Appeals also held that Appellants had adequately pled proximate causation:

We find that a driver sustaining injuries due to a collision with a horse, after that horse has escaped from a defect in a fence that has been negligently maintained by Respondent, is more in the natural and probable realm than the freakish and surprising realm.

Op. at 15.

In light of its finding that Plaintiffs could proceed against BNSF on a common-law theory, the Court of Appeals also reversed the Circuit Court's refusal to permit Plaintiffs to file their Fourth Amended Petition against BNSF. Op. at 16-18.

This Court sustained BNSF's Application for Transfer on June 25, 2002.

SUMMARY OF ARGUMENT

The Circuit Court properly dismissed Plaintiffs' claims against BNSF, which seek to hold BNSF responsible for a collision which occurred nearly one-half mile from BNSF's right of way, and which involved a horse neither owned nor controlled by BNSF, which allegedly escaped from property neither owned nor controlled by BNSF. While Plaintiffs' efforts to find a corporate defendant with liability for their injuries – despite BNSF's lack of any connection to, or responsibility for, those injuries – is hardly unprecedented, it fails under established principles of Missouri law, and must be rejected.

First, the statute which obligates BNSF to fence its right of way, § 389.650, R.S. Mo., clearly has no relevance here. Since the earliest version of that statute was enacted in 1855, Missouri courts have repeatedly held that the statute is limited to injuries occurring on the right of way itself (and, after an 1872 amendment, to injuries to the property of immediately adjacent landowners, where that property is damaged by animals entering from the right of way). Cases from a large number of other States interpret similar laws in exactly the same way. This is the full scope of BNSF's statutory duty – to prevent injuries occurring on its own property, or injuries to immediately adjoining property. Missouri courts have repeatedly refused to permit recovery under the statute except in these limited circumstances. Since the collision on which Plaintiffs' claims are based does not fall within the statute, Plaintiffs have no remedy under § 389.650.

The fact that the Legislature has repeatedly reenacted the railroad fencing statute without substantive change, in the face of this Court's consistent interpretation of it, indicates legislative acceptance of this Court's interpretation. Moreover, recognizing a statutory cause of action in Plaintiffs' favor would impermissibly add provisions to the law – the Legislature has chosen to limit the situations under which a railroad is liable for the alleged failure to maintain adequate right-of-way fencing, and this Court cannot engraft additional remedies beyond those the Legislature afforded.

Plaintiffs' attempt to state a common-law cause of action fares no better. In cases construing the fencing statute, this Court, and the Courts of Appeals, have emphasized that, apart from the fencing statute (which is irrelevant here), a railroad stands in the same position as any other landowner. Like other landowners, railroads have no obligation to fence their property to keep animals out. Plaintiffs' claim of a common-law duty is truly remarkable – what they argue, in essence, is that a Missouri property owner has a duty to fence *his* property, to contain animals kept *by his neighbor*. To

discharge this duty, every Missouri property owner would be under an obligation to conduct surveillance of his neighbor's property to determine what, if any, animals that neighbor is keeping at any particular time, and to erect appropriate enclosures to fence his neighbor's animals in. Such a rule would be unprecedented, and nonsensical. A Missouri statute, and Missouri caselaw, properly place the duty to contain animals on the persons who are responsible for the animals' presence, and who derive a benefit from the presence of the animals: the animals' owners, and the owners of the land where the animals are kept.

The lack of any statutory or common-law duty ends this case – Plaintiffs cannot pursue tort claims against BNSF without satisfying the bedrock "duty" requirement. The Court need go no further. But Plaintiffs' claims suffer from an additional, equally fatal flaw – their Petition fails to allege facts which would support a finding of proximate causation. Missouri caselaw, again like the caselaw in other States, holds, as a matter of law, that a railroad's alleged failure to fence its right of way is not the proximate cause of injuries caused by animals off the right of way. These uniform holdings obviously stem from the fact that, where injuries are not associated with the railroad's operation of its trains, or the condition of the right of way itself, the railroad's connection to those injuries is broken by an independent, superseding cause – the behavior of the animal itself. Such a roaming animal could literally go almost anywhere, and do almost anything. But as this Court held 80 years ago, railroads are not the insurers of wandering animals, just because those animals traversed a railroad right of way at some point in their travels.

Given these fundamental flaws in the legal theories on which Plaintiffs rely, the Circuit Court also properly exercised its discretion in refusing to permit Plaintiffs to file a *Fourth* Amended Petition, making more specific factual allegations that BNSF was aware of the alleged disrepair of its fencing.

The additional facts Plaintiffs sought to allege by this amendment did not cure the defect in their original pleading; further, given the closeness of Plaintiffs' motion to the trial setting in this case, and the fact that they had had the opportunity to amend on three prior occasions, the Circuit Court clearly acted within its discretion in refusing them one more, belated, bite at the apple.

ARGUMENT

I. Under § 389.650, R.S. Mo., as Uniformly Interpreted in Numerous Missouri Appellate Decisions, BNSF Owes no Duty to Plaintiffs to Fence its Right of Way. (Appellants' Point II.A)

In their Brief, Plaintiffs claim that the question whether BNSF owed them a duty to fence BNSF's right of way is an open question in Missouri:

> [BNSF] may argue that there are no Missouri cases in which a railroad has been held liable to an injured motorist who collided with livestock; however, *there are no cases excluding liability. To find a duty, it is not necessary to overrule any existing cases* but merely apply the current law to the facts in the case at bar.

Appellants' Br. 35-36 (emphasis added).

Plaintiffs' claim that this case presents an issue of first impression is simply wrong. To the contrary, this Court, and the Courts of Appeals, have repeatedly, and uniformly, held that a railroad has no statutory duty to fence its property to prevent injuries occurring off of its right of way, *except* in the very limited circumstance identified in the statute itself: where animals escape from the right of way and cause injury to the property of immediately adjoining landowners.

To rule in Plaintiffs' favor would require this Court to overrule this unbroken string of cases, which dates back to 1855. Ruling in Plaintiffs' favor would also require the Court to ignore the fact that

the Missouri Legislature has acquiesced in this interpretation of a railroad's liability by repeatedly re-enacting the relevant provisions of the railroad fencing statute, without substantive change, since at least 1872. A ruling in Plaintiffs' favor would also require the Court to disregard the fundamental canon of statutory construction that the courts may not add remedies to a statute beyond those specified by the Legislature itself. Plaintiffs offer no persuasive justification for such a dramatic rejection of established Missouri law, and the Circuit Court's dismissal of their claims against BNSF should accordingly be affirmed.

The question whether BNSF owed Plaintiffs a duty under § 389.650, R.S. Mo. presents a question of law, as to which this Court exercises *de novo* review. *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 131 (Mo. App. E.D. 1993).

A. This Court, like the Courts in Numerous Other States, Has Held that a Railroad Has no Duty to Fence its Right of Way to Prevent Injuries Occurring off of the Right of Way Itself.

Plaintiffs' allegations against BNSF are based on the railroad's purported failure to erect and maintain a legally sufficient fence pursuant to § 389.650 R.S.Mo. That statute states, in relevant part:

> 1. Every railroad corporation * * * shall erect and maintain lawful fences on the side of the road where the same passes through, along or adjoining enclosed or cultivated fields or unenclosed lands, * * *; and until fences * * * as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or enclosures, occasioned in either case by the failure to construct or maintain such fences * * *.

> 2. After such fences * * * shall be duly made and maintained, said corporation shall not be liable for any such damage, unless negligently or willfully done.

Missouri case law clearly holds that, under § 389.650, railroads do *not* owe a duty to maintain right-of-way fencing with respect to injuries, like those alleged by Plaintiffs, which occur beyond the right of way itself. In *Ingalsbe v. St. Louis-San Francisco Ry. Co.*, 295 Mo. 177, 243 S.W. 323 (1922), this Court rejected a plaintiff's attempt to hold a railroad liable under the statute where the plaintiff's cow wandered onto the right of way, then into an adjoining field, where it died by eating excessive amounts of sorghum. The Court recognized that it was "well established" that a railroad could be liable for inadequate right-of-way fencing where "the injury resulted from the peculiar conditions incident to the construction and operation of the railroad." *Id*., 243 S.W. at 324.

> None of those cases, however, touch the real question which lies at the bottom of this case, and which may be stated as follows: Is there anything in this statute creating a duty on the part of the railroad company to the owner of stock which shall stray onto its right of way, to prevent said stock, so far as the maintenance of a lawful fence will prevent it, from leaving its right of way, and going upon the land of another where it may be injured.

Id.

The Court observed that the answer to this question "depends upon the mind of the Legislature, as shown by the terms of the act, the evil to which it was to be applied as a remedy, and the nature of the remedy provided." 243 S.W. at 325. The Court then described the purpose of the railroad fencing statute as follows:

> It was designed by these laws: (1) To protect the public from injury in the use of railroad facilities for transportation of persons and property by protecting trains and their contents from the dangers incident to the presence of domestic animals *upon the tracks*; (2) to protect the owners of live stock from the danger of loss incident to its access to the track; (3) to compel railroad companies to do what was considered their part in the fencing of all inclosures of which their right of way should form a portion of the boundary.

Id. (emphasis added).

In light of these legislative objectives, *Ingalsbe* held that, once an animal leaves the railroad's right of way, the railroad's statutory liability is at an end.

> If the cow, having crossed the line and entered upon the right of way, escapes the dangers [of railroad operations] we have mentioned, and * * * turns and recrosses the unfenced line, and again stands on the ground of strangers, sees a luscious plant, * * * and eats it, and it proves to be a deadly poison, it does not look reasonable that this little journey onto the right of way has made the railroad company liable for the bad taste of the cow * * *. * * * ***Her death had no connection with the operation of the railroad or the use by the company of its right of way.***
>
> * * * ***We can see nothing in the words of the law that indicates a legisislative intention to place upon the company the burden of insurer of stock that escapes from its right of way, while in the inclosure of another.***

243 S.W. at 325-26 (emphasis added).[2] The Court accordingly reversed a verdict entered for the animal owner.

Ingalsbe's holding, that a railroad is not liable under § 389.650 for injuries occurring beyond its right of way, has been followed in at least two subsequent Court of Appeals opinions. Thus, on facts even the lower court found "very similar to the one[s] in the case at bar," Op. at 11, the Court of Appeals in *Theener v. Kurn*, 235 Mo. App. 823, 146 S.W.2d 647 (W.D. 1940), held that a railroad had *no liability* where livestock "escaped through a defective right-of-way fence * * * [and thereafter] wandered out into U.S. Highway No. 71 and traveled west thereon for a distance of one-fourth of a mile where said stock were struck by an automobile being operated on said highway." *Id.*, 146 S.W.2d at 648. Relying on *Ingalsbe* and related cases, the court held that any alleged failure by the railroad to maintain its right-of-way fencing could not, *as a matter of law*, be considered the proximate cause of injuries occurring beyond the right of way itself.

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[2] *See also Ingalsbe v. St. Louis-S.F. Ry. Co.*, 219 S.W. 1005, 1008 (Mo. App. 1920) ("We have been unable to find any case in this state where liability was placed for injury to an animal which was injured off the right of way of the company, getting to that point by reason of a defective fence. "), *aff'd*, 295 Mo. 177, 243 S.W. 323 (Mo. 1922).

> From a careful examination of the *Ingalsbe* opinion by the Supreme Court and other authorities wherein the provisions of [the predecessor to § 389.650] are involved, we conclude that ***there is no liability on a railroad company for injury to animals that have departed from the right-of-way and while outside of the right-of-way are injured by other agencies than those involved in the operation of the railroad***.

Id., 146 S.W.2d at 650.

Although Plaintiffs claim that they "could not find any case under this statute involving a vehicular collision with livestock that escaped through a railroad fence," Appellants' Br. 31, *Theener v. Kurn* is just such a case. And *Theener* holds, *as a matter of law*, that a railroad has no liability for injuries occurring beyond its right of way, since those injuries involve "other agencies than those involved in the operation of the railroad." 146 S.W.2d at 650. Under *Theener*, Plaintiffs' claims must fail, since their injuries likewise arose out of a vehicular collision occurring beyond the right of way, and had nothing to do with the railroad's operations on its right of way.

In *Scott v. Atchison, Topeka & S.F. Ry. Co*., 32 S.W.2d 139 (Mo. App. 1930), the Eastern District likewise held that a plaintiff could not recover where a cow escaped onto the railroad's right of way, but was turned off the right of way by railroad employees, and was later found neglected and dead in distant property:

> We are clearly of the opinion that defendant's failure to have maintained a statutory fence was not the proximate cause of the cow's death. It is true that she came upon the right of way through a defective fence, but aside from the fact that she was

neither struck nor frightened by a train, ***her death had no direct connection with the operation of the railroad, or with the use by the company of its right of way***.

Id. at 141 (emphasis added).

Ingalsbe and the cases following it clearly represent the majority rule on this issue: like Missouri, courts in numerous other States hold that a railroad *cannot* be liable, based on its alleged failure to maintain right-of-way fencing, for injuries occurring beyond the right of way. *See, e.g.*, *Fink v. Baker*, 46 Ill. App.3d 1061, 1068, 361 N.E.2d 702, 707 (1977); *Strand v. Great Northern Ry. Co.*, 233 Minn. 93, 105, 46 N.W.2d 266, 273-74 (1951) ("The dangers which the legislature seeks to prevent are the dangers to be encountered *within* the property which the statute requires to be fenced."; emphasis original); *Kurn v. Immel*, 184 Okla. 571, 89 P.2d 308, 308 (1939); *Brei v. Chicago, Burlington & Quincy R.R. Co.*, 265 N.W. 539, 541 (Neb. 1936); *Curran v. Chicago & Western Ry. Co.*, 289 Ill. 111, 124 N.E. 330 (1919) ("The duties of the [railroad under a fencing statute] were in relation to the dangers upon its own right of way."); *Leary v. Cleveland, Cinc., Chi. & St. L. Ry. Co.*, 74 Ind. App. 281, 123 N.E. 808, 809 (1919); *Hocking Valley Ry. Co. v. Phillips*, 81 Ohio St. 453, 91 N.E. 118, 119 (1910) ("Under this statute, we think, the liability of a railroad company for injuries to stock going upon its right of way * * * is a liability for such damages only as result from injuries received upon its right of way"); *Bear v. Chicago Great Western Ry. Co.*, 141 F. 25, 28 (8th Cir. 1905) (Minnesota law) ("the duty of the defendant was in respect of its own right of way – to prevent domesticated animals from coming there where they might be injured"); *Frisch v. Chicago Great Western Ry. Co.*, 95 Minn. 398, 104 N.W. 228, 229

(1905) ("the liability upon a railroad company for loss of domestic animals by a failure to fence its road is limited to animals killed or injured on its right of way").

To support its recognition of a duty in these circumstances, the Court of Appeals' Opinion quotes the following language from *Theener v. Kurn*:

> If a railroad company negligently fails to maintain the kind of enclosure required by law, and in consequence of such negligence an animal strays upon the track and is injured, the owner may recover the damages thus inflicted upon him, though the manner of the injury may be outside the purview of the statutory remedies.

Op. at 13, quoting 146 S.W.2d at 649-50. What the Court of Appeals failed to recognize, however, is that *Theener* itself held that "there is no liability on a railroad company for injury to animals that have departed from the right-of-way and while outside of the right-of-way are injured by other agencies than those involved in the operation of the railroad." *Id*. at 650.

Moreover, in the passage quoted by the Court of Appeals, *Theener* was itself quoting from *McCaskey v. Railroad*, 174 Mo. App. 724, 161 S.W. 277, 278 (W.D. 1913). But *Theener* suggests that *McCaskey* may not be good law. *Theener*, 146 SW.2d at 650 (noting that *McCaskey*'s extension of liability to animals injured on the right of way independent of railroad's operations was disapproved in the Court of Appeals' opinion in *Ingalsbe*). More importantly, however, *even <u>McCaskey</u> did not extend the railroad's liability to the extremes reached by the Court of Appeals' Opinion – McCaskey* involved injuries to stock which occurred *on the right-of-way itself*, albeit not injuries caused by livestock being physically struck by a train.

Thus, there is absolutely *no* Missouri precedent which supports the Court of Appeal's decision to impose a duty on a railroad for events occurring beyond the right-of-way. The Court acknowledged

that the instant case is "very similar" to *Theener*. Op. at 11. Yet it reached a conclusion directly contrary to *Theener* and other Missouri cases.

In their Brief, Plaintiffs cite *Dickson v. Omaha & St. Louis Ry. Co.*, 124 Mo. 140, 27 S.W. 476 (1894), and *Isabel v. Hannibal & St. Joseph R.R. Co.*, 60 Mo. 475 (1875), in support of their claim that the railroad fencing statute applies to their claims. Appellants' Br. 31-32. But those cases are readily distinguishable, and are irrelevant here. First, and foremost, *both Dickson and Isabel involved injuries occurring on the right of way itself* – in *Dickson*, an engineer killed when his train collided with a bull that had strayed onto the track, and in *Isabel*, a 21-month-old child killed when he was hit by a train. Neither of those cases involves a situation remotely similar to the present, where Plaintiffs' injury arises from a collision with an animal not owned by the railroad, one-half mile from the railroad's right of way, on a public highway.

These cases are distinguishable for additional reasons as well. In *Dickson*, the Court stressed that the fencing statute was designed, primarily, for the safety of those traveling on trains, such as the engineer; the Court also stressed "[t]he duty of a master [there, the railroad,] to his servant [to] exercise reasonable care * * * to keep the premises upon which he is required to work in a condition reasonably safe and secure for the performance of the duties required of him." 27 S.W. at 477. Those consideration are obviously irrelevant here – Plaintiffs were neither traveling on the railroad, nor employed by it. And in *Isabel*, the primary basis for the plaintiffs' recovery was that the railroad's right of way bisected the plaintiffs' homestead, the railroad was aware that the family crossed the track frequently to get to their water well on the far side, and the evidence showed that the railroad's employees actually *saw* the child on the track "in time to stop the train," but negligently failed to do so.

60 Mo. at 482-83. Although evidence of the alleged lack of adequate fencing was admitted at trial, the Court minimized its significance, in light of the other evidence of the railroad's negligence:

> There was no instruction asked for or given on the question of fencing. The failure to fence was merely introduced in evidence as an element conducing to show negligence; and, under all the circumstances, as the company had built its road close to the house, and was aware that the family resided there, I cannot say that it was error.

Id. at 486. *Isabel* hardly establishes any generally applicable principle of law concerning the failure to fence, and certainly no principle which is applicable here.

The fact is, if the Sills had been traveling on a train, and that train hit a horse, and they were thereby injured, § 389.650, R.S. Mo. would provide them a legal basis for recovery. But that is not this case. Plaintiffs' claim that BNSF owed them a duty under § 389.650 must be rejected.

B. Other Cases Interpreting the Railroad Fencing Statute Uniformly Hold that the Statute Prescribes the Outer Bounds of a Railroad's Liability for the Alleged Failure to Fence its Right of Way.

As described above, until the Court of Appeals' decision in this case, Missouri decisions have unanimously held that a railroad has no liability, based on its alleged failure to maintain right-of-way fencing, for injuries occurring beyond the right of way itself. But the earlier decisions establish far more.

Section 389.650, R.S. Mo. has a long history in Missouri – the original version of the statute was codified in 1855, and the provisions relevant to this appeal have been in place since at least 1872. The statute has been construed by this Court, and by the Courts of Appeals, on numerous occasions. With the exception of the Southern District's decision in this case, the Missouri appellate decisions construing the statute, and construing the scope of a railroad's liability for failing to fence its right of way,

speak with a single voice. Those decisions uniformly hold: (1) that a railroad had no obligation to fence at common law, and therefore has no common-law liability based on its alleged failure to fence; (2) that the specific remedies provided in the railroad fencing statute are exclusive, and that no recovery is available against a railroad based on its alleged failure to build or maintain right-of-way fencing, except in the specific circumstances enumerated there; and (3) that the decision whether to expand the scope of a railroad's liability for failing to fence its right of way is a matter for the Legislature, not the courts. The history of § 389.650, R.S. Mo. also establishes that, where the Legislature has deemed the statute inadequate, it has acted by amending the statute to expand the scope of a railroad's liability.

The original version of the railroad fencing statute reads in relevant part:

> Every corporation formed under this act shall erect and maintain fences on the sides of their road where the same passes through enclosed fields * * *. Until such fences * * * shall be duly made, the corporation and its agents shall be liable for all damages which shall be done, by their agents or engines, to cattle, horses or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or willfully done.

Ch. 39, § 52, R.S. Mo. 1855.

In *Clark's Administratrix v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 202 (1865), a plaintiff sought to recover from a railroad for damage to his crops, on land adjoining the railroad's right of way, allegedly caused by animals which entered the plaintiff's fields through fencing the railroad had failed to maintain. This Court rejected the plaintiff's attempt to rely on the railroad fencing statute, and held that the statute expanded a railroad's liability at common law, but that recovery was only permitted

in the circumstances specifically contemplated by the statute – *i.e.*, where the railroads "agents or engines" injure "cattle, horses or other animals thereon."

> [T]hese acts have for their object and scope the protection of the railroad, the safety of passengers and trains, and the prevention of accidents and injuries to cattle or other animals straying upon the track. They require the company to fence the railroad in and to fence the animals out; *they do not require the company to enclose the farms or fields of private land owners for their benefit, nor for any other purpose*. Nor do they impose on the company any absolute obligation even to fence the railroad in; their effect is only to make the corporation liable to the owners of cattle or other animals for injuries done to them when straying on the track, without any proof of negligence, in case they fail to erect such fences. * * *
>
> * * * At common law, it was the duty of every land-owner to keep his cattle within his own enclosures, and the liability of one owner to another for damages done by the straying cattle, turned much upon this principle * * *. Aside from the statute, the railroad company would not be bound to fence their road against stray cattle, nor would they be liable for killing such cattle upon their tracks without proof of negligence on their part * * *. The statutes so far change all this as to relieve the owners from the obligation to keep their cattle within enclosures, and to make the railroad corporation liable for killing cattle upon the track, without proof of negligence on their part, unless they fence in the railroad where it runs through enclosed fields * * *. * * * *But it cannot be inferred that the railroad company is bound to build fences for the inclosure of the farms and fields of private land-owners, nor that it*

> *incurs any liability to such owners by reason of any failure to erect and maintain the fences required by these railroad acts, otherwise than by killing cattle on the track*.

36 Mo. at 219-21 (emphasis added).

Apparently believe that adjoining landowners should be entitled to recover where animals enter their property from the right of way and damage the landowner's crops, the Legislature responded to the decision in *Clark's Administratrix* by amending the railroad fencing statute. The statute was amended prior to 1872 to read:

> Until such fences * * * shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, *or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or inclosures*, occasioned in either case by the failure to construct or maintain such fences * * *.

Mo. Stat., Ch. 37, Art. II, § 43 (Wagner ed. 1872) (emphasis added); *see also* § 809, R.S. Mo. 1879 (substantially similar wording).

Railroads challenged the constitutionality of this expansion of their liability, arguing that the amended statute took their money for "the erection and maintenance of a fence for the private use and benefit of the proprietor or owner of the adjoining land," exceeding the Legislature's authority "to pass laws for the protection and safety of passengers carried and property shipped over the [ ] railroad." *Trice v. Hannibal & St. Jos. R.R. Co.*, 49 Mo. 438, 438-39 (1872) (argument of counsel). In

Trice this Court rejected this constitutional challenge, emphasizing that it was up to the Legislature to determine what remedies should be available for a railroad's failure to properly fence its right of way:

> While the protection of the property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their track, and ***the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion***.

Id. at 440 (emphasis added); *see also Kingsbury v. Missouri, Kan. & Tex. Ry. Co*., 156 Mo. 379, 57 S.W. 547, 549 (1900) (collecting cases upholding statute's constitutionality).

But even under the amended (and expanded) statute, Missouri courts emphasized that the statute defined the outer limits of a railroad's liability – the railroad had no liability except in the circumstances contemplated by the statute. Thus, *Mangold v. St. Louis, Memphis & S.E. Ry*., 116 Mo. App. 606, 92 S.W. 753 (E.D. 1906), rejected a plaintiff's attempt to recover from the railroad, where the plaintiff alleged that the railroad's failure to erect the required fencing made his land unusable, because cattle would destroy any crops he might try to plant.

> [T]he understanding of the profession has been that the remedies of an adjacent proprietor against a railroad company for failure to fence, were confined to damages for injuries done to his domestic animals by trains, or to his crops by incursions of animals * * *. We have found no Missouri case which extended the liability of the railway company beyond those instances * * *.

Id., 92 S.W. at 753. *Mangold* then explained that its rejection of plaintiff's claim was mandated by this Court's decision in *Clark's Administratrix*:

In *Clark's Adm'x* * * *, the Supreme Court decided that the statute, as it then stood, was designed to protect railroads, passengers, and trains, and prevent injuries to cattle and other animals on the track; that it required companies to fence their roads in and animals out, but did not require them to inclose the farms or fields of adjacent proprietors. It was further held that no absolute obligation was imposed even to fence the road; but that companies were liable, without proof of negligence, to owners of cattle and other animals injured while straying on railway tracks.

* * * That decision is direct authority against the present plaintiff. * * * [U]nder the statute, as it stood until amended to read as it does now, plaintiff would have had no cause of action. Does the amended or present statute furnish a basis for the action? The amendment adds nothing except that an adjacent proprietor may recover for damage done to him by reason of horses, cattle, mules, and other animals coming on his lands in consequence of a railway company's failure to construct fences and cattle guards. Now it is not alleged that the plaintiff was damaged in that way. Hence, the amendment does not assist his complaint, and he has no better case under the present statute than he would have had under the former one. ***In truth, as a penal law, this statute must be strictly construed.*** If the Legislature had not undertaken to specify what liabilities railroad companies should be under to an adjacent proprietor in the event of failure to fence their roads, there would be strength in plaintiff's position. But ***as the statute states the responsibility of the companies, we think it must be limited to the particulars enumerated.***

Id., 92 S.W. at 754.[3]

Because Plaintiffs' claims against BNSF do not fall within "the particulars enumerated" in § 389.650, their attempt to state a cause of action under the statute must be rejected.

C. Because the Legislature Has Repeatedly Reenacted the Railroad Fencing Law Without Substantive Change, this Court Must Presume that it has Adopted this Court's Consistent Interpretation of the Statute.

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[3] *Accord, Church v. Baltimore & O. R.R. Co*., 10 Ohio App. 80 (1918) (rejecting adjoining landowner's attempt to recover the costs of posting a watchman to prevent his cattle from straying onto the track; stressing that adjoining landowners limited to recovering damages if his animals are in fact injured on the track, or building the necessary fencing and recovering the cost from the railroad); *Butler v. Consolidated Rail Corp*., 1981 WL 6730, *2 (Ohio App. Nov. 30, 1981) (following *Church* and finding no cause of action "where the abutting owner feeds his cattle to prevent them from trying to pass through the damaged right-of-way fence").

As explained above, the original railroad fencing statute was codified in 1855, and the statute has remained essentially unchanged in any relevant respect since at least 1872. Since that time, the Legislature has repeatedly reenacted the statute without substantial change, up to and including the present version found at § 389.650, R.S. Mo.

Throughout this 150-year period, this Court's consistent interpretation of the fencing statute has been that the statute *only* permits recovery for injuries occurring on the right of way itself, and by adjoining landowners, where animals escape from the right of way onto the adjoining landowners' property, and cause damage.

The fact that the Legislature has repeatedly reenacted the fencing statute without substantive change, in the face of this Court's consistent reading of the law, creates a presumption that the Legislature has endorsed and adopted this Court's interpretation. *See, e.g., Hackman v. Director of Rev.*, 771 S.W.2d 77, 81 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Messick v. Grainger*, 356 Mo. 1227, 1232, 205 S.W.2d 739, 741-42 (1947) (where present statute substantially the same as prior version interpreted by the Court, "the presumption obtains that the legislature, in adopting [the new statute], intended to adopt the construction theretofore given."); *State ex rel. Steed v. Nolte*, 345 Mo. 1103, 1108-09, 138 S.W.2d 1016, 1019 (banc 1940) (where relevant statutes "first enacted in 1872," and reenacted "in substantially the same form," the General Assembly "are presumed to have adopted the construction so placed on the statutes by this court").[4]

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[4] *See also, Investors Title Co. v. Chicago Title Ins. Co.*, 18 S.W.3d 70, 73 (Mo. App. E.D. 2000) ("we presume that the legislature, in reenacting a statute in substantially the same terms, has adopted the previous construction given to the statute by the court of last resort, unless a

contrary intention clearly appears from the statute"); *U.S. Central Underwriters Agency, Inc. v. Manchester Life & Cas. Mgmt. Co.*, 952 S.W.2d 719, 722 (Mo. App. E.D. 1997) (same).

Thus, in *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989), this Court adhered to its long-standing interpretation of Missouri's worker's compensation law, since the Legislature had expressed no disagreement with the Court's construction:

> We see no reason to depart from the uniform course of our decisions, which we believe to be correct in their application of the underlying statutory policy. Section 287.250 and its predecessors have remained substantially unchanged since 1925 even though there have been numerous amendments to other sections of the workers' compensation statutes. Those who believe that the benefits available to part time employees should be substantially reduced should make their case before the general assembly, which has shown apparent satisfaction with the courts' construction of § 287.250.

Id. at 111 (footnote and citations omitted).

Like these other cases, here the Legislature has repeatedly reenacted the railroad fencing statute without relevant substantive change *for 130 years*, and in the face of this Court's interpretation of the law in *Ingalsbe* and *Clark's Administratrix*. In these circumstances, the Legislature has accepted, and acted in reliance on, this Court's prior decisions. The Court cannot reject that unbroken line of cases now.

D. This Court May not Engraft Additional Remedies onto the Railroad Fencing Statute, Beyond Those which the Legislature Has Chosen to Adopt.

The railroad fencing statute creates a right of recovery in only a limited set of circumstances – where injuries occur on the right of way, and on behalf of neighboring landowners, if animals entering from the right of way damage their land or crops. Besides the Legislature's acceptance of this Court's reading of the statute, another fundamental canon of statutory construction requires that this Court deny Plaintiffs any recovery under the statute – this Court may not add additional remedies to § 389.650, R.S. Mo., beyond those specified in the Act itself.

As this Court recognized in *Trice v. Hannibal & St. Jos. R.R. Co.*, 49 Mo. 438 (1872), "the penal liability deemed necessary to enforce this requirement [that railroads fence their rights of way] is *a matter of legislative discretion*." *Id.* at 440 (emphasis added); *see also Mangold v. St. Louis, Memphis & S.E. Ry.*, 116 Mo. App. 606, 92 S.W. 753, 754 (E.D. 1906) ("as the statute states the responsibility of the companies, we think it must be limited to the particulars enumerated").

The principle recognized 130 years ago in *Trice* – that the Legislature, not the courts, must decide what remedies are available for the violation of a statutory duty – is a fundamental rule of statutory interpretation. Thus, in *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397 (Mo. 1986), this Court refused to allow the Director of Revenue to label a vehicle title as containing an inaccurate odometer reading based on the Director's independent investigation, where the relevant statute only permitted the Director to qualify the title if *the vehicle transferor* certified that the odometer was inaccurate. The Court stressed that it could not supplement the statutory scheme

enacted by the Legislature, even though granting the Director this extra-statutory power arguably would further the statute's general objectives:

> Although section 407.511 *et seq*. is a comprehensive enactment by the legislature concerning odometers and evinces a purpose of informing the public of the correct mileage reading on vehicles purchased, "courts must construe a statute as it stands . . . and must give effect to it as written . . .. ***This Court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other words in the statute***."

Id. at 402 (emphasis added), *quoting Wilson v. McNeal*, 575 S.W.2d 802, 810 (Mo. App. E.D. 1978).

Similarly, in *Willman v. McMillan*, 779 S.W.2d 583 (Mo. 1989), this Court refused to adopt a doctrine of intra-State *forum non conveniens*, as a way of restricting a plaintiff's broad statutory right to choose where to file suit within the State.

> The respondents raise several policy questions in their argument that the Missouri courts ought to limit the venue statute by engrafting upon it an intrastate *forum non conveniens* device. They ask whether the plaintiff should have an unlimited right to select the forum. Section 508.010(6) is the legislature's limitation on a party in deciding where to initiate an action. ***Venue is within the province of the legislature, and a court must be guided by what the legislature says. The court may not engraft upon a statute provisions that do not appear explicitly or by implication from other words in the statute.***

Id. at 585-86 (emphasis added). *Accord, Missouri Dep't of Social Servs. v. Brundage*, ___ S.W.3d ___, 2002 WL 1518500, *6 (Mo. App. W.D. July 16, 2002) (refusing to recognize extra-statutory private right of action); *Pollock v. Wetterau Food Distrib. Gp.*, 11 S.W.3d 754, 767 (Mo. App. E.D. 1999) ("One of the most fundamental principles of statutory construction is that we must give effect to the statute as written and cannot add provisions which do not appear either explicitly or by implication.").

The Legislature's decision as to what rights and remedies to recognize is frequently based on a political balancing of competing interests; courts should not upset the legislative balance by giving extra-statutory rights the Legislature chose not to afford. "To the point that courts could achieve 'more' of the legislative objectives by [adding provisions to the law], it is enough to respond that statutes have not only ends but also limits." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988); *see also Director, OWCP v. Newport News Shipbuilding Co.*, 514 U.S. 122, 136 (1995) (principle of liberally construing remedial statutes "does not add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means * * *.").

In the present case, the Legislature has imposed a statutory duty on railroads to fence their rights of way, and has also specified the remedies available to particular parties, in particular circumstances, where the railroad fails to meet its statutory obligations. Where the Legislature has determined that the existing remedies provided by the statute are inadequate (such as under the original statute as interpreted in *Clark's Administratrix v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 202 (1865)), it has amended the statute to enlarge the available remedies. Yet, even though this Court announced that the statute is limited to injuries occurring on the right of way in *Ingalsbe v. St. Louis-*

San Francisco Ry. Co., 295 Mo. 177, 243 S.W. 823 (1922), the Legislature has not broadened the available statutory remedies in the 80 years since that decision was issued. In these circumstances, it would be improper for this Court to now engraft a new remedy on the statute. Since the statute gave the Sills no right to recover, this Court must affirm the Circuit Court's dismissal of their claims.

II. Because, Like Other Landowners, BNSF Had no Common-Law Obligation to Fence its Property to Keep Persons or Animals Out, Plaintiffs Cannot State a Claim Against BNSF for Common-Law Negligence. (Appellants' Point II.B)

As explained at length above, the duty imposed on railroads by the fencing statute does not run to the benefit of persons, like Plaintiffs, injured well beyond the railroad's right of way. Plaintiffs' claim that BNSF had a *common-law* duty to maintain its fence for their benefit must fail as well.

The question whether BNSF owed Plaintiffs a common-law duty to protect them from exposure to the animals of others is a legal question, as to which this Court exercises *de novo* review. *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 131 (Mo. App. E.D. 1993).

At the outset, in analyzing Plaintiffs' common-law claim, the Court must disregard the fencing statute. As shown above, that statute does not create a duty owing to Plaintiffs, and therefore any common-law cause of action must proceed entirely independent of the statute. As this Court has held, where the fencing statute is not implicated "the railroad company stands upon precisely the same footing as other land owners, and only those acts required of natural persons, under like circumstances, can be required of the defendant." *Hughes v. Hannibal & St. Jos. R.R. Co.*, 66 Mo. 325, 326 (1877); *accord, Ingalsbe v. St. Louis-San Fran. Ry. Co.*, 295 Mo. 177, 243 S.W. 323, 326 (1922) (but for fencing statute, "the railway company held its uninclosed right of way with the same rights and subject to the same immunities which pertain to the title of other uninclosed land").

Therefore, BNSF's duty to fence its property must be judged by the same standards applicable to any other Missouri landowner. "*At common law, no duty devolved upon a land owner to fence*, and stock wandering upon land of another and being injured by pitfalls, places no liability on the landowner." *Theener v. Kurn*, 235 Mo. App. 823, 146 S.W.2d 647, 649 (W.D. 1940) (emphasis added). Thus, in *Mangold v. St. Louis, Memphis & S.E. Ry.*, 116 Mo. App. 606, 92 S.W. 753 (E.D. 1906), the court rejected out-of-hand the claim that the railroad might be liable at common law, even if not liable under the fencing law, where the plaintiff alleged that the railroad's failure to erect the required fencing made his land unusable:

> ***Railroad companies are not required by the common law to fence their right of way. Hence, there was no breach of any common-law duty by defendant*** which would lay it liable to plaintiff, and we may dismiss that phase of the case without further remark.

Id., 92 S.W. at 753.

Similarly, the Court of Appeals' opinion in *Ingalsbe v. St. Louis-S.F. Ry. Co.*, 219 S.W. 1005 (Mo. App. 1920), *aff'd*, 295 Mo. 177, 243 S.W. 323 (Mo. 1922), states categorically:

> ***It is the settled law of this state that there is no common-law duty of a landowner to fence animals out***. If therefore railroad companies are to be held for any damages that might come to live stock by reason of getting over or through a defective fence, that liability must be based upon the failure of the railroad company to perform some statutory duty * * *.

Id., 219 S.W. at 1007; *see also id.* at 1009 ("there is no common-law duty resting on any one to merely fence against animals, and [ ] this applies to railroad companies the same as to any one else"); *Dooley v. Missouri Pac. Ry. Co.*, 36 Mo. App. 381, 387 (E.D. 1889) ("at common law the defendant, like any other land-owner, had a right to leave its land unfenced"); *Clark's Administratrix v. Hannibal & St. Joseph R.R. Co.*, 36 Mo. 202, 220 (1865) ("Aside from the statute, the railroad company would not be bound to fence their road against stray cattle * * *.").

Once again, the Missouri caselaw is consistent with cases from other States, which hold that, like other landowners, a railroad has no common-law liability for failure to adequately fence its rights-of-way, but can only be held liable, if at all, under a statute imposing a duty to maintain right-of-way fencing. *See, e.g., Kansas, Okla. & Gulf Ry. Co. v. Kiersey*, 266 P.2d 617, 618 (Okla. 1954) (rejecting common-law negligence claim for injuries beyond right of way since "[a]t common law there was no duty of a railroad to fence its right of way against cattle."); *Brei v. Chicago, Burlington & Quincy R.R. Co.*, 265 N.W. 539, 541 (Neb. 1936) ("there is no common-law duty that requires anyone, including railroad companies, to fence against animals. The statute quoted herein is in derogation of the common law and was intended to change the common law only as to the special instances mentioned expressly within the statute itself."); *Leary v. Cleveland, Cinc., Chi. & St. L. Ry. Co.*, 74 Ind. App. 281, 123 N.E. 808, 809 (1919); *Hocking Valley Ry. Co. v. Phillips*, 81 Ohio St. 453, 91 N.E. 118, 119 (1910).

Adopting Plaintiffs' argument would have startling, and clearly improper, consequences. In essence, Plaintiffs contend that a landowner has a common-law duty to fence *its* land, in order to contain *its neighbor's livestock*, to prevent those animals from straying onto the property of a third party. Apparently, Plaintiffs argue that, if Property Owner A has animals on his property, his neighbor,

Property Owner B, has a duty to erect and maintain a fence along the A-B boundary, *to prevent Property Owner A's animals from getting out*. This is absurd, and contrary to clearly established, long-standing Missouri law – a landowner has no obligation to take active measures to prevent injuries by his neighbor's animals.

The absurdity of adopting the result Plaintiffs advocate is also revealed by considering the measures a property owner would have to take to discharge this supposed duty. The property owner would need to know what his neighbor was doing, on the neighbor's property, at all times. Are the livestock the neighbor is maintaining bovine? Equine? Or just swine? Does the property owner accordingly need to build a fence that is horse-high, hog-tight, or both? What of ostrich; or elephants? The property owner's obligation to fence would depend upon the nature of his neighbor's actions, on a day-to-day basis, over which the property owner has no control, and from which he derives no benefit.

The responsibility to build a fence to contain livestock should rest on the person creating the risk, and receiving the benefit from maintaining livestock – the owner of the animals, or the owner of the land on which the animals are pastured, *not* on a neighbor. Missouri courts have sensibly recognized that, under the common law, the duty to contain domesticated animals was on the owner of the animals, not adjoining landowners:

> By the common law every man was bound to keep his cattle in his own lands. No man was bound to fence his field against an adjoining one. Every man was bound to keep his cattle in his own field at his peril.

Growney v. Wabash Ry. Co., 102 Mo. App. 442, 76 S.W. 671, 672 (W.D. 1903); *see also Lins v. Boeckeler Lumber Co.*, 221 Mo. App. 181, 299 S.W. 150 (E.D. 1927) (cited by Court of Appeals, Op. at 12).

And this is also what a Missouri statute requires – as the Court of Appeals recognized in this very case, "[u]nder § 270.010, [R.S. Mo.,] it is unlawful for owners of domestic animals to permit them 'to run at large outside the enclosure of the owner.'" Op. at 3 n.4. Under the statute, the injured party need only prove the time and place of the accident, defendant's ownership of the animal, and damages; the burden is on *the defendant* to show freedom from negligence. *Claas v. Miller*, 806 S.W.2d 141, 145 (Mo. App. W.D. 1991); *Beshore v. Bretzinger*, 641 S.W.2d 858, 862-63 (Mo. App. W.D. 1982). Yet, although it acknowledged this statutory duty on the person actually responsible for the animals, the Court of Appeals imposed an unprecedented, extra-statutory duty *on the animal owner's next-door neighbor*. This is unjustified, and nonsensical.

It is no answer to contend that the animal's owner may have relied on BNSF to fence this side of his property. The stock law unambiguously places the duty on *the animal owner* to contain his livestock. Moreover, to the extent any right-of-way fence was inadequate to contain the horse, under the fencing statute the animal's owner had a remedy – after giving the railroad five day's notice "the owners or proprietors of said lands * * * may erect or repair such fences, * * * and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction the cost of such fences * * * together with a reasonable compensation for his time," and ten percent per year interest. § 389.650.3, R.S. Mo. In the face of his overriding responsibility to superintend his own animals, the animal owner could not sit idly by, and rely on the railroad to discharge *his* statutory duty.

Besides being unjustifiable on policy grounds, the recognition of a common-law duty to fence would be inconsistent with the general rule that a landowner has no common-law duty to fence its property to prevent trespassers (such as the horse here) from being injured by dangerous conditions on the property of others, even when they reach the place of injury by traversing the landowner's property

– once again, the landowner's duty is limited to preventing injuries on his own property. *See, e.g.*, *Mair v. C&O R.R.*, 851 F.2d 829, 833 (6th Cir. 1988) (noting that "under Michigan law the actual site of a person's injury is crucial"; railroad not liable for failure to fence where trespasser injured on another's property after traversing right of way); *Calhoun v. Belt Ry. Co*., 314 Ill. App.3d 513, 731 N.E.2d 332, 339 (2000) (same; collecting cases from numerous jurisdictions); *Thomas v. Duquesne Light Co*, 500 A.2d 1163, 1167 (Pa. Super. 1985) (same); *see generally*, 62 AM.JUR.2d, Premises Liability § 185, at 553 (1990) ("An owner or occupant of premises has been held to owe no duty to trespassers, to protect them from peril or hazards on adjoining or neighboring premises over which the defendant has no control, and the courts have declined to imposed liability in such cases on any theory which might warrant a recovery by a trespasser if injured on the defendant's premises."); Annot., 39 A.L.R.2d 1452 (1955).

In analyzing the duty issue, the Court of Appeals held that "existence of a duty is normally based on foreseeability that the conduct complained of might lead to the injury suffered." Op. at 7. But the Court of Appeals statement is inaccurate – as Plaintiffs recognize,

> [T]he central issue in determining whether a defendant has a duty to an injured part is public policy. In *Hoover's Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. banc 1985), the court stated:
>
> > "The judicial determination of the existence of the duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; consideration of

> cost and ability to spread the risk of loss; the economic burden upon the actor in the community . . .." *Id*. at 432.

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The Court of Appeals ignored the broader, public-policy issues which must be addressed before imposing a duty on the railroad. Among those public policy considerations, this Court must recognize the following facts:

(1) that railroads, like other landowners, generally have *no* duty to fence their property;

(2) that the Missouri Legislature, *for 150 years*, has refused to impose liability on railroads for injuries occurring beyond their rights of way;

(3) that the animal's owner, the person in the best position to know of the presence of an animal on unenclosed property, and therefore the person best able to take measures to prevent the animal from running at large, is *already* subject to strict, statutory liability for injuries caused by his roaming animals;

(4) that landowners, like the railroad, generally have no common-law duty to prevent trespassers from traversing their property, and suffering injury off the landowner's own property; and

(5) that imposing a duty on Missouri landowners to contain *their neighbor's* animals would be entirely unworkable, since it would require them to investigate their neighbor's use of their own property, and modify their fences based on what their neighbor's choose to do.

When these factors are appropriately considered, there is no reason for this Court to depart from long-standing Missouri law to impose an extraordinary duty on BNSF, essentially making it the keeper of its neighbor's livestock.

III. As Missouri Appellate Courts Have Held on Numerous Occasions, Any Alleged Failure by the Railroad to Adequately Fence its Right of Way Was not a Proximate Cause of Plaintiffs' Injuries as a Matter of Law. (Appellants' Point I)

The question whether Plaintiffs' Third Amended Petition stated a cause of action, by adequately alleging the element of proximate causation, presents a question of law subject to this Court's *de novo* review. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. 1993).

As explained above, BNSF had no duty, either under § 389.650, R.S. Mo., or under the common law, to build or maintain a fence to prevent a horse on neighboring property from getting onto a public highway. To recover for negligence, Plaintiffs must establish three separate elements: "[1] that the defendant had a duty to protect [them] from injury, [2] that the defendant breached that duty, and [3] that the defendant's failure directly and proximately caused [them] injury." *Robinson v. Health Midwest Dev. Gp.*, 58 S.W.3d 519, 521 (Mo. 2001); *accord*, *Stanley v. City of Independence*, 995 S.W.2d 485, 487 (Mo. 1999). Given the lack of any enforceable duty, Plaintiffs' claims against BNSF must fail – "[w]here no duty is indicated by Missouri statute, case law, or otherwise, a fundamental prerequisite to establishing negligence is absent." *Ford v. GACS, Inc.*, 265 F.3d 670, 682 (8th Cir. 2001); *accord*, *Smith v. King City School Dist.*, 990 S.W.2d 643, 647 n.2 (Mo. App. W.D. 1998).

Given the lack of an actionable duty, this Court need not even address the separate question whether Plaintiffs' allegations are adequate to show that any alleged negligence of BNSF was a proximate cause of their injuries. But Plaintiffs' claims fail on this element also, since caselaw holds that a railroad's alleged failure to adequately fence its right of way is not a proximate cause of injuries occurring beyond the right of way itself.

Thus, in *Scott v. Atchison, Topeka & S.F. Ry. Co.*, 32 S.W.2d 139 (Mo. App. 1930), the Eastern District held that a plaintiff could not recover where a cow escaped onto the railroad's right of way, but was turned off the right of way by railroad employees, and was later found neglected and dead in distant property:

> We are clearly of the opinion that defendant's failure to have maintained a statutory fence was not the proximate cause of the cow's death. It is true that she came upon the right of way through a defective fence, but aside from the fact that she was neither struck nor frightened by a train, ***her death had no direct connection with the operation of the railroad, or with the use by the company of its right of way***.

Id. at 141 (emphasis added); *accord*, *Fink v. Baker*, 46 Ill. App.3d 1061, 1068, 361 N.E.2d 702, 707 (1977) ("the failure of a railroad company to fence its track cannot be the proximate cause of an injury to a person occurring on an adjacent and parallel track belonging to another railroad company which also failed to fence its track, though such person had to cross the track of the first company to reach the place of injury"); *Kurn v. Immel*, 184 Okla. 571, 89 P.2d 308, 308 (1939) ("Ordinarily, damages to livestock occurring off the right of way of a railroad company are not a natural or probable consequence of a failure of the company to construct or maintain proper fences."); *Brei v. Chicago*,

Burlington & Quincy R.R. Co., 265 N.W. 539, 541 (Neb. 1936) ("damages to live stock, sustained after they have escaped from the right of way of the railroad company, are not ordinarily a natural and probable consequence of a failure of the railroad company to construct or maintain proper fences").

These decisions rest on a fundamental principle of proximate causation – a defendant's action is not the proximate cause of an injury if an independent cause intervenes between the defendant's action and the injury. As this Court recognized in *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. 1993), even if the minimal "but for" causation standard is satisfied, proximate causation is *not* established "[i]f the facts involved an extended scenario involving multiple persons and events with potential intervening causes." *Id*. at 865. While frequently a factual question, "a court properly interposes its judgment in this determination when the evidence reveals the existence of an intervening cause which eclipses the role the defendant's conduct played in the plaintiff's injury." *Tompkins v. Cervantes*, 917 S.W.2d 186, 190 (Mo. App. E.D. 1996).

Here, the horse itself constitutes such an independent, intervening cause. While the action of the horse in *entering* the railroad's right of way through a defective fence may have been the "natural and probable consequence" of the failure to erect an adequate fence, no one could predict that the horse would *leave* the right of way after entering it, or could predict its actions after it did so. The horse literally could have traveled for miles, ended up anywhere, and done virtually anything once it got there. Yet the Court of Appeals has now held BNSF liable for any injury caused by the horse, wherever it may roam, and whatever it may do. This notwithstanding the fact that BNSF neither owned, nor had any control at any time, over the animal.

In these circumstances, where Plaintiffs' injuries resulted from the independent actions of the horse, *at most* any alleged negligence by BNSF merely created the conditions in which the collision was possible. BNSF's conduct did not *proximately cause* that collision, or Plaintiffs' consequent injuries.

> Prior and remote cause cannot be made the basis of a negligence action if the remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, and there intervened between that cause and the injury a distinct, successive, unrelated and efficient cause of the injury, though the injury would not have occurred but for the condition or occasion.

Esmond v. Bituminous Cas. Corp., 23 S.W.3d 748, 753 (Mo. App. W.D. 2000); *see also Tompkins v. Cervantes*, 917 S.W.2d at 191 (same).

This Court long ago refused "to place upon [a railroad] the burden of insurer of stock that escapes from its right of way, while in the inclosure of another." *Ingalsbe v. St. Louis-San Francisco Ry. Co.*, 295 Mo. 177, 243 S.W. 323, 326 (1922). Yet that is just what the Court of Appeals decision has done. That result should be rejected.

IV. The Circuit Court Did not Abuse its Discretion in Denying Plaintiffs Leave to File a Fourth Amended Petition Against BNSF, Since the Proffered Amendment Would not Have Cured the Defects in Plaintiffs' Third Amended Petition. (Appellants' Points III & IV)

A denial of a request to amend the pleadings is presumed to be correct, and the burden is on the proponent to show that the trial court clearly and palpably abused its discretion. *Vickers v. Progressive Cas. Ins. Co.*, 979 S.W.2d 200, 205 (Mo. App. E.D. 1996). Parties do not have an

absolute right to repeatedly amend their pleadings, and a court's refusal to allow an amendment is an abuse of discretion only when the denial is so arbitrary and unreasonable as to shock the court's sense of justice and indicate a lack of careful consideration. *Id.*, *citing Rhodus v. Wheeler*, 927 S.W.2d 433, 436 (Mo. App. W.D. 1996).

Here, the Circuit Court properly rejected Plaintiffs' proffered Fourth Amended Petition against BNSF for one simple reason: that amendment was futile. L.F. 44, 60. A critical factor in deciding whether leave to amend should be granted is whether the proffered amendment would cure any inadequacy in the moving party's pleadings. *Sheehan v. Northwestern Mut. Life Ins. Co.*, 44 S.W.3d 389, 394 (Mo. App. E.D. 2000). Here, Plaintiff's proposed Fourth Amended Petition would not cure the defects described above – the allegation that the horse actually escaped through the right-of-way fencing, or that BNSF was actually aware of any inadequacies in the fence, cannot create a duty where none otherwise existed, or establish the direct causal link between BNSF's conduct and Plaintiffs' injuries which is so plainly lacking.[5] The fact that Plaintiffs had amended their complaint on three prior occasions, just five months before a scheduled jury trial, also justified the Circuit Court's action.

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[5] The proffered amendment is also misleading in one critical particular: in attempting to bolster their claim that it was foreseeable that failure to maintain the railroad's right-of-way fencing could cause their injuries, Plaintiffs allege that "*the pasture* was adjacent to U.S. Highway 60, a heavily traveled divided highway." Supp. L.F. 12 ¶ 23 (emphasis added). But Plaintiffs fail to acknowledge that *the railroad's right of way* was almost one-half mile from U.S. Highway 60, on *the far side* of the pasture.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment, dismissing Plaintiffs' claims against BNSF with prejudice, should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing, together with a copy of the brief on diskette, was served by first class mail, postage prepaid, on this 26th day of August, 2002 on the following:

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CERTIFICATE OF COMPLIANCE
REQUIRED BY SUPREME COURT RULE 84.06(c)

The undersigned hereby certifies the following:

1. I am an attorney practicing law with the law firm of Lathrop & Gage L.C., 2345 Grand Boulevard, Kansas City, Missouri 64108-2684. My telephone number is (816) 292-2000. My Missouri Bar Number is indicated below.

2. I am one of the attorneys submitting the foregoing Substitute Brief for Respondent.

3. I hereby certify that the foregoing Brief complies with the limitations contained in Supreme Court Rule 84.06(b). Based on the word-counting feature of the WordPerfect software used to prepare this Brief, the Brief contains 12,882 words.

4. I have filed a copy of the foregoing Brief with the Court on diskette, and have served a copy of that diskette on each adverse party. I hereby certify that the diskettes have been scanned for virus and that the diskettes are virus-free.

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