

# WHAT'S REALLY HAPPENING DOWN ON THE FARM: GUIDANCE FOR RESOLVING EMPLOYEE NEGLIGENCE SUITS AGAINST SMALL FARM OWNERS

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## ABSTRACT

*A quick google search of “small American farms” yields a variety of photographs featuring rolling hills, green acres, and sunshine. While picturesque, the reality is that small farms pose an infinite array of hazards and dangers. This is an important topic in the modern legal world because small farms are the exception to the law, falling outside of Occupational Safety and Health Administration (OSHA) regulation despite the fact that agriculture ranks among the most hazardous industries. Yet, the small farm employer must still conform to the common law duty to provide their employees with a reasonably safe place to work. The issue is that judges and juries have only common law negligence to guide their decision-making; this framework coupled with the lack of understanding of the agricultural industry yields inconsistent and unfair results in many cases. The solution is a factors test that is readily malleable to analyze the specific small farm at issue. This note explains what’s really happening down on the farm and offers a framework to reach merit-based, consistent results when resolving farm employee versus farm employer negligence suits.*

## I. INTRODUCTION

When you hear occupational descriptions such as ultra-hazardous, high fatality rates, or unpredictable workplace environment, which occupations first pop into your mind?<sup>1</sup> Some likely candidates might be aircraft pilots, iron and steel workers, police officers, or electrical power-line installers. It’s

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<sup>1</sup> National Institute for Occupational Safety and Health, *Agricultural Safety*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 12, 2018), <https://www.cdc.gov/niosh/topics/aginjury/default.html>. See also Bureau of Labor Statistics, *Farmers, Ranchers, and Other Agricultural Managers*, US DEP’T OF LAB. <https://www.bls.gov/ooh/management/farmers-ranchers-and-other-agricultural-managers.htm#tab-3> (last modified Apr. 13, 2018).

not likely that a small family farm located in the rural Midwest would first come to mind, and if it did, you probably grew up on a farm or within a farming community.

Agriculture is one of the most dangerous industries in the United States and in the entire world.<sup>2</sup> According to the U.S. Bureau of Labor Statistics, agriculture has the highest fatality rate of any job in the country.<sup>3</sup> For every 100,000 workers in the nation, 3.6 died on the job in 2016, while farmers died at more than six times that rate.<sup>4</sup> But what significance does the hazardous nature of agriculture have in the legal field today?

The answer lies within the exemption granted to small farms from Occupational Health and Safety Administration (OSHA) enforcement and from workers' compensation statutes. Laws regulating agriculture are often referred to as the "law by exception" for this reason.<sup>5</sup> The confusion caused by these "exceptions" coupled with the lack of understanding and appreciation of how the small farming industry works, leads to inconsistent results when negligence claims against farm employers by farm employees are brought to court. This note directly addresses the issue by proposing a set of factors to enable the court to focus on the key characteristics of the farm at issue, thereby minimizing guess work and irrelevant considerations, and in turn producing consistent and fair judgments.

Part II of this note provides a brief overview of the broad variety of hazards that are inherent to the small farm working environment. Part II then turns to OSHA and its failed efforts to regulate small farms. In addition, Part II discusses the exception provided in many states' workers' compensation statutes and how that exception affects common law tort principles, specifically in regard to the farm employer's duty to provide a reasonably safe workplace to employees. Finally, Part II addresses common misconceptions and stereotypes that are typically placed on the small farmer and illustrates how these misconceptions can result in legal consequences.

Part III analyzes the issues with the current application of common law tort principles as applied to OSHA-exempt and workers' compensation-exempt small farms. Part IV proposes a multi-factor test to determine whether a small farm employer has breached his or her duty of care to provide a reasonably safe place to work to the employee(s).

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<sup>2</sup> National Institute for Occupational Safety and Health, *supra* note 1.

<sup>3</sup> James B. Miller, *Farm Fatalities on the Rise: Ag Industry Ranked Most Hazardous in the US*, AG WEEK (Jan. 4, 2019), <https://www.agweek.com/business/agriculture/4552357-farm-fatalities-rise-ag-industry-ranked-most-hazardous-us>.

<sup>4</sup> Andy Kiersz, *The 34 Most Dangerous Jobs in America*, BUS. INSIDER (July 22, 2018), <https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7>.

<sup>5</sup> Roger A. McEowen, *Worker's Compensation and the Exemption for Agricultural Labor*, IOWA STATE UNIV. (July 24, 2015), <https://www.calt.iastate.edu/article/workers%E2%80%99-compensation-and-exemption-agricultural-labor>.

## II. BACKGROUND

The Midwest is covered in farmland, hence the region's well-deserved nickname of the "Corn Belt." In fact, the Midwest is home to one of the most "intense" areas of agriculture in the entire world.<sup>6</sup> In the spring and fall, during planting season and harvest season, the roadways of the Midwest are filled with slow moving, heavy machinery from combines and tractors, to loaded semi-trailer trucks and grain carts, and of course, the general public zipping along from home to work and back.<sup>7</sup> The pervasive interaction with the public on roadways presents a high risk of accident, and thus a high risk of liability for farmers.<sup>8</sup> The latter is easily imaginable if you've ever shared the road with a combine harvester or a tractor accompanied by a loaded grain cart, but this note will be focusing on a more "behind the scenes" risk of liability for the small farm employer: lawsuits brought by farm employees against their farm employer.<sup>9</sup> This topic is particularly relevant as the number of applicable laws regulating agricultural labor continue to grow while the hazardous nature of farming remains a constant.<sup>10</sup>

### A. Brief History of the Occupational Safety and Health Administration

OSHA was enacted in 1970 in an effort to implement safe practices and healthful working conditions for U.S. workers and to enforce the employer's duty to provide employees a workplace free from hazards likely to cause injury or death.<sup>11</sup> OSHA recognizes that that the fields of construction, general industry, maritime, and agriculture are all replete with a broad variety of dangerous hazards.<sup>12</sup> Consequently, employers in these industries are

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<sup>6</sup> U.S. Department of Agriculture, *Agriculture in the Midwest*, MIDWEST CLIMATE HUB (Oct. 19, 2017, 8:00 AM), <https://www.climatehubs.ocs.usda.gov/hubs/midwest/topic/agriculture-midwest>.

<sup>7</sup> Tracey Erickson, *Farm Equipment, Safety on the Road, Everyone's Role*, IGROW: SDSU EXTENSION, <https://extension.sdstate.edu/farm-equipment-safety-road-everyones-role> (Updated Dec. 20, 2018).

<sup>8</sup> See Marizen Ramirez, *Farm Equipment Crash Study*, GREAT PLAINS CENTER FOR AGRIC. HEALTH <https://www.public-health.uiowa.edu/gpcah/center-projects/farm-equipment-crash-study/> (last accessed Mar. 6, 2019).

<sup>9</sup> See generally The Lyon Firm, *Farm Work Injuries: Employees at High Risk of Preventable Accidents*, THE LYON FIRM, <https://thelyonfirm.com/practice-areas/farm-work-injuries/> (last visited Mar. 2, 2019); See also *Farm Work-Related Injuries and Fatalities- Don't Become Another Statistic This Harvest*, MICHIGAN FARM BUREAU (Sept. 19, 2018), <https://www.michfb.com/mi/press-release/farm-work-related-injuries-fatalities/>.

<sup>10</sup> J.W. LOONEY & JOHN D. COPELAND, HANDBOOK OF LAWS AND REGULATIONS AFFECTING ARKANSAS FARM EMPLOYERS AND EMPLOYEES 1-3 (The National Agricultural Law Center: University of Arkansas 1993), [http://nationalaglawcenter.org/wp-content/uploads/assets/articles/looney&copeland\\_labor.pdf](http://nationalaglawcenter.org/wp-content/uploads/assets/articles/looney&copeland_labor.pdf).

<sup>11</sup> Jack L. Runyan, *Federal Laws and Regulations Affecting Farm Safety*, NAT'L AGRIC. SAFETY DATABASE 3 (2001), [http://nasdonline.org/static\\_content/documents/1833/d001777.pdf](http://nasdonline.org/static_content/documents/1833/d001777.pdf).

<sup>12</sup> See generally *OSHA At-A-Glance*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/Publications/3439at-a-glance.pdf> (last visited Nov. 10, 2018).

required to keep their workplaces free from recognized hazards, and they must take reasonable steps to ensure that they identify these hazards so as to prevent such potential injury.<sup>13</sup> OSHA regulations provide that employees have the right to work in an environment free from risk of serious harm and the right to receive adequate training and information to best ensure their understanding of any tools or equipment utilized in performing their duties.<sup>14</sup>

### *1. The Small Farm Exemption from OSHA enforcement*

In 1978, Congress began preventing OSHA from inspecting small farms<sup>15</sup> with ten or fewer employees.<sup>16</sup> These exempt farms are not subject to OSHA's programmed safety inspections, employee's complaints pursuant to OSHA, or any required education and training from OSHA.<sup>17</sup> The exemption granted to small farmers is due to a number of factors, from geographical obstacles to efficiency and cost reasons; but certainly is not based on any sort of false pretense that injury or death is less likely to occur on these smaller scale farms.<sup>18</sup> Whether this exemption is sensible depends on who you ask.

Commenting on a perceived victory for small farms in 2014 in which the U.S. Department of Labor (DOL) decided to withdraw enforcement that would have allowed OSHA to regulate grain bins as commercial storage, Ryan Findlay, national legislative counsel for the Michigan Farm Bureau (MFB), stated "DOL's withdrawal of this rule will protect a lot of farms from unwarranted regulatory scrutiny."<sup>19</sup> Findlay went on to note that "[t]his was a case of the government overstepping its bounds, plain and simple. Farmers just don't need that level of scrutiny—they don't need the government looking over their shoulder 24-7-365 as they go about carrying on the work that's been in their blood for generations."<sup>20</sup>

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<sup>13</sup> See generally U.S. DEPARTMENT OF LABOR, OSHA SMALL BUSINESS HANDBOOK (2005), <https://www.osha.gov/Publications/smallbusiness/small-business.pdf>.

<sup>14</sup> See generally *OSHA At-A-Glance*, *supra* note 12.

<sup>15</sup> *Farmers' Advance: America's Small Farms Avert Unwarranted Scrutiny from OSHA*, WALLBERG HOUSE (Feb. 26, 2014), <https://walberg.house.gov/media/in-the-news/farmers-advance-americas-small-farms-avert-unwarranted-scrutiny-osha>.

<sup>16</sup> Occupational Safety and Health Admin, OSHA Instruction CPL 02-00-051, *Enforcement Exemption and Limitations under the Appropriations Act*, U.S. DEP'T OF LAB. (Apr. 25, 2018), <https://www.osha.gov/enforcement/directives/cpl-02-00-051>.

<sup>17</sup> *Id.*

<sup>18</sup> Markus Pyykkönen & Bob Aherin, *Occupational Health and Safety in Agriculture*, 53 SWEDISH UNIV. OF AGRIC. SCI. 391, 398 (2005), <https://pdfs.semanticscholar.org/abf4/13b075619019ee0bca7fb30be3590daedc93.pdf>; See also Eli Wolfe, *When Workers are Killed on Small Farms, OSHA's Hands Are Tied*, THE NEW FOOD ECONOMY (Nov. 28, 2018), <https://newfoodeconomy.org/small-farm-worker-death-osha/>.

<sup>19</sup> WALLBERG HOUSE, *supra* note 15.

<sup>20</sup> *Id.*

While farmers tend to oppose OSHA regulations, agricultural safety professionals generally advocate that OSHA should be enforced on all farms no matter the number of employees.<sup>21</sup> Statistically speaking, it is easy to understand why agricultural safety professionals see OSHA regulations as necessary to small farm safety. Ninety percent of farms across the United States fall outside of OSHA regulations.<sup>22</sup> The characteristics of these exempt farms include their tendency to use older equipment as compared to large commercial farms,<sup>23</sup> as well as that small farms delegate a broad variety of tasks to only one or very few employees. These characteristics, coupled with the little supervision between the employer and employee(s) in the small farm working environment, make it no surprise that small farms, while perhaps the exception to the law, are not the exception to the high injury and fatality rate in the agricultural industry.<sup>24</sup>

## 2. *Beamer v. Thompson: Application of the OSHA Small Farm Exemption to Employee-Employer Negligence Suit*

For illustrative purposes, it is worth taking a glance at how the OSHA exemption applies when a negligence action brought by a farm employee against the employer is brought to court. In *Beamer v. Thompson*, the Virginia Circuit Court refused to hear expert testimony from the vice president of a construction firm who taught safety courses on OSHA.<sup>25</sup> The plaintiff farm employee sought to use the testimony to establish that the defendant farm employer breached his duty of care to provide Beamer with a reasonably safe place to work; the common law action was not barred on account of Virginia's small farm exemption from the Workers' Compensation statute.<sup>26</sup> Defendant-employer did not fall subject to OSHA because of the exemption provided to agricultural farms that employs less than ten laborers.<sup>27</sup> In coming to this conclusion, the court considered Congress' longstanding prohibition against allowing federal funds to be enforced or proscribed to farming operations which maintain ten or less

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<sup>21</sup> Pyykkön & Aherin, *supra* note 18.

<sup>22</sup> *Id.*; see also Memorandum from Weeun Wang & Virginia Ruiz of Farmworker Justice to Occupational Safety and Health Administration 15 (Dec. 21, 2010), <https://www.farmworkerjustice.org/sites/default/files/documents/Farmworker%20Justice%20Submission%20to%20OSHA%202010-12-21.pdf>.

<sup>23</sup> See Charlie Glass, *May 2016 U.S. Tractor & Combine Sales Analysis*, FARM EQUIPMENT (June 16, 2016), <https://www.farm-equipment.com/articles/12964-may-2016-us-tractor-combine-sales-analysis> (explaining that tractor purchase decisions are based on factors such as their current cost of living and 401(k) balances).

<sup>24</sup> Timothy W. Kelsey, *The Agrarian Myth and Policy Responses to Farm Safety: Public Health Then and Now*, 84 AM. J. PUB. HEALTH 1173 (July 1994).

<sup>25</sup> See generally *Beamer v. Thompson*, No. 02-3158, 2009 WL 7310701 at \*1 (Va. Cir. 2009).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

employees and held that, “[A] small family farmer like Derricks is not subject to OSHA enforcement of either the specific standards or the general duty clause. The appropriation riders further inform on Congress’s intent to insulate farmers from OSHA.”<sup>28</sup>

#### B. Overview of Workers’ Compensation Law and the Varying Degrees of the Agricultural Exception From State to State

Workers’ compensation law guarantees an employee compensation for work-related injuries regardless of whether the employer is at fault.<sup>29</sup> For those employers required to comply with workers’ compensation laws but who fail to carry a policy, the consequence is that they lose the common law defenses and, depending on the state, could be charged with a misdemeanor or possibly even a felony.<sup>30</sup> However, as with OSHA, agriculture is once again the exception.<sup>31</sup>

Many of the biggest agricultural states in the Midwest, including Arkansas, Illinois, Iowa, Kansas, Kentucky, Missouri, and Wisconsin, provide exemptions to agricultural employers to varying degrees from their workers’ compensation laws.<sup>32</sup> From state to state the exclusion for farm laborers varies, with some states only applying the exclusion to family members, while others only apply the exclusion to casual or seasonal labor.<sup>33</sup>

The following comparison illustrates the differences from state to state: Illinois exempts any farm with less than 400 working days<sup>34</sup> of agricultural labor per quarter during the preceding calendar year; in Iowa the agricultural exemption is only for those farms with a payroll of \$2500; in Kansas the agricultural exemption applies to those farms with a gross annual payroll of \$20,000 or less; and in Wisconsin a farm is exempt if it hires less than six employees in any twenty days in the calendar year, but if within any twenty

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<sup>28</sup> *Id.*

<sup>29</sup> McEowen, *supra* note 5.

<sup>30</sup> Reuben Dourte, *Do You Need Workers’ Compensation for Your Small Farm?* CORNELL SMALL FARMS PROGRAM (2016), <https://smallfarms.cornell.edu/2016/04/04/do-you-need-workers-compensation>.

<sup>31</sup> LexisNexis Newsroom Staff, *Larson’s on the Farm Labor Exemption in Workers’ Compensation*, LEXISNEXIS (Aug. 30, 2013), <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/employment-status/posts/larson-s-on-the-farm-labor-exemption-in-workers-compensation>.

<sup>32</sup> *Worker’s Compensation Law- State by State Comparison*, NAT’L FED’N OF IND. BUS (June 7, 2017), <https://www.nfib.com/content/legal-compliance/legal/workers-compensation-laws-state-by-state-comparison-57181/>.

<sup>33</sup> McEowen, *supra* note 5.

<sup>34</sup> *See Labor Regulations for Farmers*, N.E. ORGANIC FARMING ASS’N OF VERMONT, <https://nofavt.org/faq-labor-regulations-farmers> (last visited Feb. 1, 2019) (explaining that a “day” counts whenever one employee works at least one hour on the farm and if another employee works that same day for at least one hour than that day constitutes 2 man days).

days during the calendar year the farm employs six or more employees, it is required to purchase workers' compensation within ten days.<sup>35</sup>

When a farm meets the exception provided in their respective state's workers' compensation laws, they will be afforded the common law defenses that existed prior to the enactment of the workers' compensation statutes.<sup>36</sup> An exempt farm employer still has the availability of the defenses afforded to an employer prior to the enactment of workers' compensation laws, namely, assumption of the risk, contributory or comparative negligence, and the fellow servant rule.<sup>37</sup>

### C. Common Law Duty to Provide Employees with a Reasonably Safe Place to Work

Small farms that do not fall under workers' compensation laws are subject to common law tort principles, including the duty to take reasonable precautions to ensure the employee is free from harm.<sup>38</sup> These precautions include:

[T]he duty to provide a safe place to work, providing safe appliances, tools and equipment, the duty to give warnings about which the employee might reasonably not know, and the duty to make and to enforce rules for the conduct of employee that would tend to make the work safer.<sup>39</sup>

Under common law, an employer must take necessary precautions against all foreseeable risks.<sup>40</sup> Foreseeability considers whether an employer could have reasonably contemplated that the risk that caused the employee's injury could have possibly occurred.<sup>41</sup> The Restatement Second of Torts

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<sup>35</sup> DRAKE AGRICULTURAL LAW CENTER, THE LEGAL GUIDE FOR DIRECT FARM MARKETING Chapter 9 (2011), <http://directmarketersforum.org/chapter-nine-labor-and-employment>; see also *Farm Employment Law: Know the Basics and Make Them Work for Your Farm*, FARM COMMONS <https://farmcommons.org/resources/farm-employment-law-know-basics-and-make-them-work-your-farm> (last updated Aug. 1, 2016).

<sup>36</sup> Looney & Copeland, *supra* note 10, at 9-11.

<sup>37</sup> Christopher J. Boggs, *Employees Exempt from Worker's Compensation*, INSURANCE JOURNAL (Mar. 27, 2015), <https://www.insurancejournal.com/blogs/academy-journal/2015/03/27/360686.htm>.

<sup>38</sup> See Joe Parcell & Marvin Brees, *Hiring and Managing Farm Labor*, UNIV. OF MISSOURI EXTENSION (Oct. 1999), <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/50714/g0070-1999.pdf?sequence=1>.

<sup>39</sup> *Id.*

<sup>40</sup> David Andrew, THE REPORT OF THE LAW OF NEGLIGENCE, REVIEW OF THE LAW OF NEGLIGENCE: FORESEEABILITY, STANDARD OF CARE 101, 103 (2002), [https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001\\_Foreseeability.pdf](https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_Foreseeability.pdf).

<sup>41</sup> David Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1291, 1298 (2009), [https://scholarcommons.sc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1937&context=law\\_facpub](https://scholarcommons.sc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1937&context=law_facpub).

defines foreseeability as “an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another.”<sup>42</sup> The Restatement Third of Torts considers the following factors to determine whether the actor exercised reasonable care: the foreseeable likelihood, the foreseeable severity, and the burden of precautions necessary to eliminate or reduce the risk of harm.<sup>43</sup>

The concept of the reasonably foreseeable component of the finding of negligence on the part of the employer creates a complex issue with regard to the inherently hazardous nature of farming. The idea that a risk is reasonably foreseeable is that the risk is not so unlikely that a reasonable person would neglect to remedy it.<sup>44</sup> Accordingly, risks that are very unlikely to occur can still be reasonably foreseeable.<sup>45</sup> The broad variety of everyday potential hazards on small farms are endless,<sup>46</sup> and for farm employers who have been brought up on a farm and who have worked in agriculture for their entire lives, it is likely that they are very aware of the majority, if not all, of the potential hazards.<sup>47</sup> This combination sets a farm employer up for an extremely high likelihood of liability pursuant to the current application of common law tort principles to small farm negligence actions.

*1. Suddath v. Parks and Hanke v. Wacker: Conflicting Decisions in Determining the Standard of Providing a Reasonably Safe Place to Work on the Small Farm when Livestock is Involved*

In *Sudath v. Parks*, a farm worker brought a negligence suit against defendant Parks’ farm due to an injury he incurred as a result of separating bulls during his course of employment.<sup>48</sup> Suddath argued that Parks failed to adequately warn him to pay particularly close attention to a certain bull.<sup>49</sup> The court acknowledged that Parks owed Suddath a duty of reasonable care

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<sup>42</sup> RESTATEMENT (SECOND) OF TORTS SECTION § 284(a) (1965).

<sup>43</sup> Owen, *supra* note 41, at 1292.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See Indiana Rural Safety and Health Council, *Common Farm Hazards Safety Checklist*, PURDUE AG SAFETY & HEALTH PROGRAM [https://engineering.purdue.edu/~agsafety/IRSHC/Resources/SafetySnippets/Common\\_Farm\\_Hazards\\_Safety\\_Checklist.html](https://engineering.purdue.edu/~agsafety/IRSHC/Resources/SafetySnippets/Common_Farm_Hazards_Safety_Checklist.html) (Last Updated: May 18, 2006); see also Texas A&M AgriLife Extension, *Identifying and Controlling Hazards on the Farm*, INT’L RISK MGMT. INST. (2016), <https://www.irmi.com/docs/default-source/afis-handouts/identifying-and-controlling-hazards-on-the-farm.pdf?sfvrsn=8>.

<sup>47</sup> See Anne Collins McLaughlin & Christopher B. Mayhorn, *Avoiding Harm on the Farm: Human Factors*, 10 NORTH CAROLINA STATE UNIVERSITY 26, 32 (Jan. 2011), [https://www.researchgate.net/publication/279725569\\_Avoiding\\_harm\\_on\\_the\\_farm\\_Human\\_factors](https://www.researchgate.net/publication/279725569_Avoiding_harm_on_the_farm_Human_factors) (explaining how the more knowledge and expertise a farmer has the more he or she might be inclined to view the risk as non-threatening or manageable).

<sup>48</sup> Suddath v. Parks, 914 S.W.2d 910, 912 (1995).

<sup>49</sup> *Id.* at 912-13.



to warn him of non-obvious dangers involved in Suddath's employment.<sup>50</sup> However, the court ultimately found that Parks had no duty to warn him of "any special aggressive tendencies" of the bull at issue, and that the conduct of bulls is "obvious to a reasonably prudent person," so that Parks was "under no duty to warn of an obvious danger."<sup>51</sup>

Contrast the Tennessee Court of Appeals decision in *Suddath* with the Fifth District Appellate Court of Illinois decision in *Hanke v. Wacker*. Farm employee Hanke sought recovery for injuries suffered as a result of attempting to separate a pair of fighting boars on the defendant Wacker's hog and grain farm.<sup>52</sup> At the time of the underlying accident, the boars weighed approximately 350 pounds.<sup>53</sup> The boars were kept in pens built by Wacker and secured by a "hook" and "chain."<sup>54</sup> Hanke claimed that the pens were in need of repair but that Wacker failed to remedy the problem, even after allegedly being told he needed to do so.<sup>55</sup> The lack of proper maintenance of the pen became the ultimate issue in the decision of the case.<sup>56</sup>

One of Hanke's duties was to move and sort the boars by using a push board.<sup>57</sup> Shortly before the injury occurred, Hanke was moving a boar, allowing it to walk down the middle alleyway, when he looked up and saw this boar fighting with another boar still in its pen.<sup>58</sup> The other boar then broke out of its pen and began fighting with the original boar in the walkway, which caused a big enough disturbance in the other pens that multiple boars broke out, though only the original two were involved in the fight.<sup>59</sup> Hanke proceeded to attempt to separate the two boars by using the push board, but the boars knocked him down.<sup>60</sup> As a result, Hanke suffered injury to his right knee.<sup>61</sup>

Wacker argued that Hanke had assumed the risk of being injured by the boars, and therefore assumption of the risk precluded his recovery.<sup>62</sup> The court disagreed, stating that Hanke had provided considerable evidence to show that the injury was caused by Wacker's negligent failure to properly

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<sup>50</sup> *Id.* at 913.

<sup>51</sup> *Id.* at 914.

<sup>52</sup> *Hanke v. Wacker*, 576 N.E.2d 1113, 1114 (Ill. App. 5th Dist. 1991).

<sup>53</sup> *Id.* at 1115.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* A push-board is a piece of plywood two feet by three feet with handles on each end which causes the hog to change directions when necessary.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

construct and maintain the pen which the boar had broken out of, thus barring assumption of the risk.<sup>63</sup>

These two cases provide an example of the court dealing with an employee's injury from livestock and the employee's subsequent claim that the farm employer failed to provide a reasonably safe place to work. Both cases dealt with injuries caused by livestock, but through employing different approaches in analysis, the courts reached completely different outcomes. In *Suddath* the court deemed bulls inherently dangerous, and that their inherent dangerousness is common knowledge to almost any person.<sup>64</sup> In *Hanke*, the court concentrated on the employer's negligence in maintaining the pens, without giving much weight to the extent of the farm employee's knowledge and familiarity of the dangerousness that fighting, three-hundred pound boars presents.<sup>65</sup>

Concededly, in *Suddath*, the court was dealing purely with the inherent dangerousness of the bull and the employer's duty to warn, wherein *Hanke*, the court was dealing with the additional issue of the employer's failure to adequately maintain the fence. The point of this illustration is not to argue that *Hanke* came out wrong or right, but rather to point out the important considerations that were left out of the analysis. For example, there was no discussion of the usual atmosphere involved in the sorting or handling of hogs.<sup>66</sup> The comparison of these two cases, illustrates as an example of when the courts could benefit from a set of factors designed to enable full consideration of the vital underlying characteristics of the small farm at issue. A set of factors will better equip the court to focus on the key issues regarding the case at issue and to reach a well-informed result with confidence and consistency.

## 2. *Stone v. Von Eye Farms: An Example of the Application of the Duty to Provide a Reasonably Safe Place to Work on the Small Farm Involving Proper Training of Farm Machinery*

In *Stone v. Von Eye*, a South Dakota case, the court was faced with the issue of whether or not Von Eye Farms was negligent in providing its

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<sup>63</sup> *Id.* at 1120.

<sup>64</sup> *Suddath v. Parks*, 914 S.W.2d 910, 914 (1995).

<sup>65</sup> *See Hanke*, 576 N.E.2d at 1120.

<sup>66</sup> *See* John Shutske & Michele Shermann, *Safe Animal Handling*, PORK INFORMATION GATEWAY (Apr. 19, 2012), <http://porkgateway.org/resource/safe-animal-handling/> (explaining that hogs are easily stressed and frightened and that these characteristics are at the forefront when they are being sorted and loaded); *see also* Ed Pajor, *How to Move and Handle Pigs*, PORK INFORMATION GATEWAY (Apr. 17, 2012), <http://porkgateway.org/resource/how-to-move-and-handle-pigs/> (explaining the importance of care and knowledge in avoiding injury when sorting hogs due to the stress of being sorted and separated).

employees with a reasonably safe place to work.<sup>67</sup> This case is included in order to illustrate the potentially impracticable standard a farm employer could be held to, especially in regard to the amount of employer-employee oversight that would be required or to the proof of formal training for each employee, neither of which is the norm in the small farming industry. The incident giving rise to this case occurred when farm employee Stone was standing behind the front tire of a Case-International Harvester tractor, unbeknownst to another employee, Carroll.<sup>68</sup> Carroll partially backed over Stone when he reversed the tractor, driving over Stone's ankle and leg, resulting in severe injury.<sup>69</sup> Stone alleged that Von Eyes was negligent in providing him a safe place to work based on Von Eye's inadequate training and supervision of the employees, and that as a result, Stone was required to work under unreasonable conditions.<sup>70</sup> On appeal from summary judgment to Von Eyes, the Supreme Court of South Dakota reversed and remanded for further proceedings on the basis that there were questions of material fact in regard to Von Eyes' negligence and the affirmative assumption of the risk.<sup>71</sup>

Stone and Von Eye put forth contrasting arguments answering the legal question of whether a safe workplace was provided or Von Eyes was negligent.<sup>72</sup> Defendant Von Eye argued that just like with any other farming operation, they did not supervise their employees at all times, but rather, given the nature of farming, they hired competent employees entrusted with independently operating the machinery without supervision after Von Eye's determination that they were capable of doing so in a safe manner.<sup>73</sup>

The court found the injury might have been in part due to the possibility that Stone did not consider "the possibility that the tractor [driven by employee Carroll] would move while Kneebone [another employee] remained hanging on outside the cab [which possibly obstructed Carroll's view]."<sup>74</sup> Stone's argument rests on the theory that because Carroll only yelled out a warning before proceeding to back the tractor up and while Kneebone was still standing on its step that this proves that Carroll had not received proper training, because if he had, he would have known to not move the tractor while someone was riding on the steps.<sup>75</sup>

*Stone v. Von Eye* should be fairly easily decided if the key factors are considered. Here, it would be import for the court to consider the following: how long Carroll had been working on Von Eye's farm, how many times he

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<sup>67</sup> *Stone v. Von Eye*, 741 N.W.2d 767, 769 (2007).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 772-73.

<sup>72</sup> *Id.* at 770.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 772.

<sup>75</sup> *Id.* at 771.

had driven the tractor prior to the accident, whether Von Eye's had given him training in operating the tractor, the typical proximity between Von Eye and his employees throughout the day, and the degree to which similar grain farms in the region exercised control over their employees operating of a tractor in an open field. In summary, to hold Von Eye negligent for Carroll's potential disregard for the proper safety procedure, namely operating a large piece of machinery with someone standing on the ladder, might seriously lead the farmer to question: "Is it even worth the risk to hire an employee?"

#### D. Common Misconceptions about Small Farms that Have the Potential of Improperly Influencing Court Decisions

##### 1. *Unpopular and Unsuccessful Attempts by Congress to Enforce OSHA Regulations on Small Farms*

In 1956, at Bradley University, Dwight D. Eisenhower said, "Farming looks mighty easy when your plow is a pencil, and you're a thousand miles from the corn field."<sup>76</sup> Eisenhower was referencing the idea that the government lacked a genuine understanding of how the farming industry worked but nonetheless wanted to dictate it.<sup>77</sup> This idea was still going strong in the 1970s when congressional hearings and floor debates considering the OSHA exemption for small farms prompted proponents of the exemption to take the stance that if anyone understood the risks associated with farming and cared enough to prevent them from occurring it was the farmers themselves and not legislators in Washington.<sup>78</sup> Responding to the possibility of federal regulation over their daily lives, farmers contended, "[We do] not need big government in Washington to remind them that they need to make their farm equipment and farm environment safer for themselves, their families, and employees."<sup>79</sup> Now contrast the proponents' position with the opposing view: "There should be a uniformity of standards that apply throughout the country and farmworkers should be treated no differently from other kinds of workers, and all farmworkers should be protected by the same standards that other workers are protected by."<sup>80</sup>

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<sup>76</sup> Jim Schielein, *Food for Thought*, CHICAGO TRIBUNE (May 23, 2018), <https://www.chicagotribune.com/news/ct-xpm-2008-05-23-0805220419-story.html> (quoting Dwight D. Eisenhower in an address at Bradley University in Sept. 1956).

<sup>77</sup> Carrol Smith, *Fifty-Three-Year-Old Quote Still Rings True Today*, CORN SOUTH (2010), <https://cornsouth.com/2009/october-2009/fifty-three-year-old-quote-still-rings-true-today/>.

<sup>78</sup> Kelsey, *supra* note 24, at 1174.

<sup>79</sup> *Id.*

<sup>80</sup> Occupational Safety and Health Act of 1969: Hearing on H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373; Before the Select Subcomm. on Labor of the Comm. on Educ. and Labor, 91st Cong. 1180, 1347, 1369–1371 (1970).

Today, the tension continues. In 2013, numerous United States Senators submitted a letter to the Secretary of the United States Department of Labor, Thomas E. Perez, which included the following excerpt:

*Worker safety is an important concern for all of us—including the many farmers who probably know better than OSHA regulators how to keep themselves and their employees safe on farms. If the administration believes that OSHA should be able to enforce its regulations on farms, it should make that case to Congress rather than twisting the law in the service of bureaucratic mission creep. Until then, Congress has spoken clearly and we sincerely hope that you will support America's farmers and respect the intent of Congress by reining in OSHA.*<sup>81</sup>

OSHA faced heavy criticism when the agency issued fines to small farms based on issues with their grain storage activities.<sup>82</sup> OSHA had classified family farms with grain bin storage as handling a “wholesale grain operation” on the basis that these storage bins were separate from the farming operation and thus did not fit within the exemption.<sup>83</sup> This classification has since been withdrawn, which appears to be good news to most farmers.<sup>84</sup> Small farmers’ general disapproval is still rooted in the idea that Dwight Eisenhower’s quote perfectly encompassed all the way back in 1956: the farmer’s belief that he or she best knows how to handle the farm’s issues,<sup>85</sup> and consequently that government inspections cannot offer any further assurance of safety.

## 2. *Typical Stereotypes about the Small Farmer’s Lifestyle Contrasted with Reality*

The following statement by Chris Bennett, Technology and Issues Editor of *Ag Web’s Farm Journal*, illustrates how the public’s perceptions and commonly held stereotypes involving the small farming working environment and the character of the small farmer himself or herself, may affect the small farm owner’s fate in a lawsuit. Bennett stated:

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<sup>81</sup> *End OSHA’s Harassment of Farmers*, NAT’L HOG FARMER, <https://www.nationalhogfarmer.com/business/end-osha-s-harassment-farmers>. Source: Office of Sen. Mike Johanns (R-NE) | Dec 23, 2013 (emphasis added).

<sup>82</sup> Peggy Kirk Hall, *OSHA Issues New Guide on the Small Farm Exemption*, OHIO STATE UNIV. EXTENSION. (Aug. 1, 2014), <https://farmoffice.osu.edu/blog-tags/osha-authority>.

<sup>83</sup> Chris Anderson, *DOL Rules Small Farms Exempt From OSHA Grain Inspection*, RFD RADIO NETWORK (Feb. 17, 2014), <http://farmweeknow.com/story-dol-rules-small-farms-exempt-osha-grain-inspections-0-108753>.

<sup>84</sup> Wallberg, *supra* note 15.

<sup>85</sup> Hall, *supra* note 82.

Mirroring the U.S. mainstream, agriculture has entered an era of litigation and legal wrangling. Lawsuits against farmers once were a rarity. Yet, today's producer is often popularly perceived as a wealthy, land-rich businessman with substantial assets. As civil cases stack up in farm country, the plain truth is difficult to ignore: The factors surrounding liability can preserve a given operation or shred a legacy to the deepest roots.<sup>86</sup>

Modern day farmers are often given one or more of the following stereotypes: they are uneducated, they are all rich, they only work during the fall and spring, they abuse their livestock, they mistreat their employees, they stay "home" all day, they just drive around in new pickups all day, and so on.<sup>87</sup> As Bennett suggests, these perceptions do matter, especially when personal injury cases make it to the court room.

In contrast to these stereotypes, the reality is often that the small farm owner does not have any weekends, holidays, or vacation time.<sup>88</sup> Despite the development of modern technology, the farming industry still requires physically exhausting labor, often totaling fifteen hour work days.<sup>89</sup> For the majority of farmers, there is no such thing as sleeping in or taking a sick day, and when it comes to financial success, farmers are at the mercy of the weather and the market.<sup>90</sup> For livestock farmers, the cows, hogs, or whatever type of animal he or she may own, require tending to whether it's Christmas Day or any other day of the year.<sup>91</sup> Teresa Bjork, a writer for the Iowa Farm Bureau, who spent her childhood years growing up on the farm, offers a very real and personal observation. She reflects: "I remember mornings when my dad's eyes were red and puffy, he couldn't take a breath without coughing, and he struggled to put on layer after layer of clothing to fight the winter chill so he could start his morning chores."<sup>92</sup> Bjork finished up her article by

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<sup>86</sup> Chris Bennett, *Farmer Beware: Agriculture Enters Age of Civil Suits*, AG WEB (Jan. 3, 2018), <https://www.agweb.com/article/farmer-beware-agriculture-enters-age-of-civil-suits-naa-chris-bennett/>.

<sup>87</sup> AgWeb Staff, *17 Misconceptions About Agriculture*, AG WEB (Nov. 19, 2013 5:00 AM), [https://www.agweb.com/article/seventeen\\_misconceptions\\_about\\_agriculture\\_naa\\_nate\\_birt/](https://www.agweb.com/article/seventeen_misconceptions_about_agriculture_naa_nate_birt/); see also Hayley Beck, *Top Ten Myths About Agriculture and Farming*, FASTLINEBLOG (Mar. 25, 2014) <https://www.fastline.com/frontpage/2014/03/25/top-ten-myths-about-agriculture-farming/>.

<sup>88</sup> See Bureau of Labor Statistics, *Farmers, Ranchers, and Other Agricultural Managers*, U.S. DEP'T OF LABOR, [https://www.bls.gov/ooh/management/farmers-ranchers-and-other-agricultural-managers.htm?view\\_full#tab-3](https://www.bls.gov/ooh/management/farmers-ranchers-and-other-agricultural-managers.htm?view_full#tab-3) (last modified Sept. 4, 2018); see also Jake Zuckerman, *For Farmers, Holidays are Workdays*, THE NORTHERN VIRGINIA DAILY (Nov. 24, 2016), <http://www.nvdaily.com/news/local-news/2016/11/for-farmers-holidays-are-workdays/>.

<sup>89</sup> Princeton Review, *A Day in the Life of a Farmer*, <https://www.princetonreview.com/careers/62/farmer> (last visited Nov. 10, 2018).

<sup>90</sup> Darleen Sichley, *No Sick Days for Farmers: Rain or Shine, in Sickness and in Health, Farmers Must Face the Elements and Get the Work Done*, HOARD'S DAIRYMAN (May 15, 2018), <https://hoards.com/blog-23160-no-sick-days-for-farmers.html>.

<sup>91</sup> Zuckerman, *supra* note 88.

<sup>92</sup> Teresa Bjork, *No Sick Days on the Farm*, IOWA FARM BUREAU (Jan. 28, 2013), <https://www.iowafarmbureau.com/Article/No-sick-days-on-the-farm>.

adding, "It's hard to take a sick day when so many families, here at home and around the world, depend on a farmer's work."<sup>93</sup> To run a farm requires the type of discipline and determination described by Bjork; successful small farms run on highly motivated individuals with a passion for what they do.<sup>94</sup>

Aside from the tasks that farmers grow accustomed to every day, farmers are also faced with numerous unexpected problems, from fires and floods, to chemical spills and machinery malfunctions.<sup>95</sup> This requires the ability to think critically and to make extremely tough and quick decisions at any given moment.<sup>96</sup> Responsible farmers know that when weather makes doing the planned task impossible, they do not have the option to simply rest for the remainder of the day, but instead they must take advantage of the time to maintain equipment, upkeep storage facilities, or accomplish other tasks such as restocking feed, selecting the best seed, or tending to land located elsewhere.<sup>97</sup>

### III. ANALYSIS

The discussion set out above serves to illustrate not only the uniqueness and complexity of the small farming industry, but also the issues that are consequential of forcing this industry to fit into the common law negligence analysis. A fair and just decision, one truly derived from the merits of the case, can only be arrived at with consistency if the courts cease treating small farm employee-employer cases the same as any breach of duty of care in the workplace claim. Even though judges, attorneys, and jurors may have the best intentions in reaching a fair, merit based judgment, there needs to be procedural safeguards in place in the form of factors that must be weighed and taken into consideration when dealing with suits based on the small farm employer's alleged negligence.

A set of factors tailored to the small farming industry will enable the court to have a more focused and purposeful approach when considering whether a farm employer has breached his or her duty of care. These proposed factors, though heavily based on the long-established concepts of foreseeability and risk-utility analysis, are also extremely practical. Therefore, an added benefit is that small farm employers will be able to recognize and make sense of the judgment and will be well-equipped to understand how to prepare better to prevent future injuries. Finally, careful

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<sup>93</sup> *Id.*

<sup>94</sup> Zuckerman, *supra* note 88.

<sup>95</sup> See John Guilfoyle, MD., *Hazards of Farming*, 38 CANADIAN FAMILY PHYSICIAN 2044, 2044 (1992), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2145506/pdf/canfamphys00127-0094.pdf>.

<sup>96</sup> Zuckerman, *supra* note 88.

<sup>97</sup> *Id.*

consideration of the factors will protect the injured employee plaintiffs, as each case will receive an individualized analysis using the applicable factors in respect of the characteristics of the farm at issue.

This Part establishes why the small farming industry needs a set of factors tailored specifically for the kind of work carried out on small farms, and how the current application of the law to small farms is inadequate.

A. The Common Law Duty to Provide a Reasonably Safe Place to Work:  
The Inadequacy of this Standard as Applied to Small Farms

1. *Unique Factors in the Small Farming Environment Affecting the Duty of Care Standard*

The physical working conditions of farming combined with the typical interpersonal relationships between farm managers and farm employees create great difficulty in determining the standard that a farmer must maintain in order to fulfill the requirement of providing their employees with a reasonably safe place to work.<sup>98</sup> At the core of this issue is that the working environments that farm employers and employees are subjected to do not look like a typical workplace environment. A farmer's working environment varies greatly and may consist of vast and wide open acres filled with complex and heavy machinery, or perhaps a fire-filled scene in the form of burning ditches and brush, or a building filled with large, sometimes aggressive, farm animals capable of causing serious injury. In other words, farmers often have little control over working conditions in these situations.<sup>99</sup>

In addition, the environment changes drastically from season to season given the amount of outdoor labor that is required of farmers.<sup>100</sup> Not only does the physical environment change quite drastically depending on the season, but the physical environment in the farming industry can change various times in a single day.<sup>101</sup> In the instance of a farm mixed of both grain and livestock, a farmer might find himself in a hog pen in the morning, spreading manure in a field during the afternoon, and working on equipment

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<sup>98</sup> See generally Stephen F. Matthews & Timothy W. Triplett, *Liability of Farm Employers*, UNIV. OF MISSOURI EXTENSION (Oct. 1993), <https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/50736/g0451-1980.pdf?sequence=1&isAllowed=y>.

<sup>99</sup> International Labour Conference, *Report VI: Safety and Health in Agriculture*, Chapter 5, GB.271/4/1, para. 274, (May 30–June 15, 2000), <https://www.ilo.org/public/english/standards/relm/ilc/ilc88/rep-vi-1.htm>.

<sup>100</sup> Bureau of Labor Statistics, *Farmers, Ranchers, and Other Agricultural Managers*, UNITED STATES DEP'T OF LABOR (Apr. 13, 2018), <https://www.bls.gov/ooh/management/farmers-ranchers-and-other-agricultural-managers.htm>.

<sup>101</sup> Illinois Work Net Center, *Farmers and Farm Managers*, AMERICAN JOB CENTER, <https://apps.il-work-net.com/cis/clusters/OccupationDetails/100077?parentId=110100&section=conditions&sectionTitle=Working%20Conditions> (last visited Nov. 10, 2018).



in the machinery shed in the evening.<sup>102</sup> Farmers who own livestock usually work seven days a week, and this is especially true for farms which fall under the exemption from OSHA. These smaller farms, often times consisting entirely of family, do not have the manpower to allow working less than seven days a week to keep the farm running properly and efficiently.<sup>103</sup> The number of risks farmers are exposed to on a daily basis range from exposure to extremely cold to hot temperatures, exposure to hazardous chemicals and machinery, or being injured by larger, aggressive livestock, such as a bull or a boar.<sup>104</sup> The uniqueness and complexity of the working environment in the farming industry is recognized at the international level.<sup>105</sup> Consider the following the statement from the International Labour Organization:

Agricultural work — and this is one of its distinguishing characteristics — is carried out in a rural environment where there is no clear-cut distinction between working and living conditions. As agricultural work is carried out in the countryside, it is subject to the health hazards of a rural environment as well as those inherent in the specific work processes involved. Most agricultural work is carried out in the open air and consequently agricultural workers are dependent on weather changes to perform their tasks. This factor not only undermines the efficiency of the operations, but also influences working conditions, making them difficult and dangerous (e.g. a rainstorm while harvesting, gusts of wind when pesticides are being applied, etc.).<sup>106</sup>

Farm employees engaged in the above tasks are subject to these unique risks every day. As currently applied, the common law duty to provide a reasonably safe place to work is prejudicial to small farmers who do not have the means or resources to supervise at all times, especially when the injury is of no fault of the employer but rather is a risk that is inherent in the farming industry.<sup>107</sup> When an injury occurs due to an alleged defect by a dangerous condition on the job site, the law requires a showing of control of the place of injury and actual or constructive notice of the unsafe condition.<sup>108</sup> The argument this note presents is not that a farm employee owes no duty of care or that the employee should assume the risk of the farm employer's negligence.<sup>109</sup> Rather, the argument is that courts have deemed the defendant farm employer negligent in instances where the precaution necessary to

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> International Labour Conference *supra* note 99.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 1 AM. JUR. 2D *Proof of Facts* § 517 (originally published in 1974).

<sup>109</sup> Illinois Pattern Jury Instructions, Civil, No. 13 (Supp. 1997) <http://www.illinoiscourts.gov/CircuitCourt/CivilJuryInstructions/13.00.pdf>.

prevent the injury is not reasonable in consideration of the small farm environment where the farmer often has no control over the source of the injury.

## 2. *The Court's Weaknesses in Hearing Small Farm Disputes*

The hog farm case discussed previously in this note, *Hanke v. Wacker*, is an example of when the court has failed to illustrate a full degree of understanding of the particular industry at hand. Hog farming, like many tasks performed on a farm, is physically demanding, and due to the large size and heavy weight of boars and sows, severe injuries can result.<sup>110</sup> The court seems to underestimate the likelihood that Hanke was aware of the risk that the boars posed.<sup>111</sup> Statements from the farmers whose lives are dependent on farming know that it does not take long to realize the potential danger that hog farming undoubtedly poses.<sup>112</sup> Take, for example, the following observation made by Wanda Patsche, a Minnesota hog farmer:

I wish people could experience the things we experience. I wish they could see the fights that sows have which are a natural response to their innate social hierarchy that determines who is the “king” sow. The fights that result in injuries such as bites to body parts including ears, snouts, legs and vulvas. And sometimes these injuries are lethal. I wish people could hear the ear-piercing screams we hear when a sow is attacking another. No, we don't rush to grab our phones to videotape the pig attacks. Instead, we attempt to break up the fights, assess and care for the injuries, all while hoping not to be injured ourselves.<sup>113</sup>

In addition to the known danger that hog sorting and separating presents, the court in *Hanke* did not give much consideration to the other factors involved in this case, such as how most hog pens are constructed and maintained on a similarly sized farm or the tools provided to Hanke in sorting the hogs.<sup>114</sup> The push board that Hanke used is what is generally used

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<sup>110</sup> Auburn University, *Swine Safety*, LIVESTOCK SAFETY, <http://www.ag.auburn.edu/~schmisp/safety/swine.htm> (last visited Nov. 10, 2018).

<sup>111</sup> See *Short v. Federated Livestock Corp.*, 235 Ore. 81, 88 (1963) (finding that though Defendant employer owes a duty of care to provide a reasonably safe place to work to Plaintiff employee, in this particular instance the employee had much experience with feedings hogs and was well aware of the danger that was directly before him); see generally *Hanke v. Wacker*, 576 N.E.2d 1113 (Ill. App. 5th Dist. 1991).

<sup>112</sup> Wanda Patsche, *What I Wish People Knew About Pig Farming*, MINN. POST (Oct. 7, 2014), <https://www.minnpost.com/minnesota-blog-cabin/2014/10/what-i-wish-people-knew-about-pig-farming/>.

<sup>113</sup> *Id.*

<sup>114</sup> See generally *Hanke*, 576 N.E.2d 1113.

for sorting hogs, namely a solid, hand-held panel board.<sup>115</sup> The court also did not consider any training, instructions, or general guidelines provided by Wacker to Hanke prior to the accident as compared to other similarly sized hog farms in the same region. Additional information, in the form of factors that are found in the proposal section of this note, are needed to reach a fair judgment in this type of case—namely, a case in which the accident giving rise to this injury had both the characteristics of being a usual task but also the capability of resulting in serious harm if performed incorrectly.

## B. Differences in Understandings of How the Small Farm Industry Works: The Farmer, the Court, and the Lay Person

### 1. *The Farmer's Perception of the Dangers and Hazards that are Inherent in Farming*

Farmers understand the inherently hazardous nature of farming,<sup>116</sup> but that doesn't necessarily mean that they always appreciate when additional steps must be taken to protect employees or third parties from risks that the farm owners themselves often view as merely a part of their normal day. This issue is more prevalent on small farms due to the OSHA exemption.<sup>117</sup> The general duty clause of the OSHA Act requires employers to: “[F]urnish to each of his employees a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>118</sup> However, Congress will not allow federal funds to enforce OSHA standards on any farm with ten or less workers.<sup>119</sup> The result is that the small farm employer, often times in the business for decades, is left to make subjective judgments regarding whether a piece of machinery, certain work area, or farm animal poses a serious risk of harm to an employee.<sup>120</sup>

In support of the argument that small farms are of the highest risk yet equipped with the least amount of resources or guidance, Bob Aherin, a professor who is the head of the Agricultural Health and Safety Program and

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<sup>115</sup> Auburn University, *supra* note 110.

<sup>116</sup> Allison Petty, *Small Farms, Big Risks: Why Small Farms Remain One of America's Most Dangerous Workplaces*, HERALD&REVIEW (Aug. 25, 2018), [https://herald-review.com/business/agriculture/why-small-farms-remain-one-of-america-s-most-dangerous/article\\_c41cc538-112Sd-5312-a44d-a92b8c247efd.html](https://herald-review.com/business/agriculture/why-small-farms-remain-one-of-america-s-most-dangerous/article_c41cc538-112Sd-5312-a44d-a92b8c247efd.html).

<sup>117</sup> Ohio's Country Journal, *Is My Farm Exempt: OSHA Confusion Continues*, OHIO AG NET (July 28, 2014), <http://ocj.com/2014/07/is-my-farm-exempt-osha-confusion-continues/>.

<sup>118</sup> Dourte, *supra* note 30.

<sup>119</sup> OSHA Interpretation, Standard Number 1928.21, <https://www.osha.gov/laws-regs/standard-interpretations/2007-07-16>.

<sup>120</sup> Sarah Hadley, *Small Farms Fly Under Work Safety Radar*, THE DAILY NONPAREIL (Dec. 29, 2013), [https://www.nonpareilonline.com/news/other/small-farms-fly-under-work-safety-radar/article\\_d9847f28-6fff-11e3-8e8b-001a4bcf887a.html](https://www.nonpareilonline.com/news/other/small-farms-fly-under-work-safety-radar/article_d9847f28-6fff-11e3-8e8b-001a4bcf887a.html).

researches farm injury cases at the University of Illinois, noted, “The small family farm is one that tends to be one of our focal points because they have a much higher risk of injury than larger farms tend to have.”<sup>121</sup> Data show that the increasing age of the average farmer may be a contributing factor. In 2012 the United States Department of Agriculture reported that more than 31 percent of principal farm operators were 65 years of age or older, and the average age of principal operators in 2012 was 58 and has been greater than 50 since at least the 1974 Census of Agriculture.<sup>122</sup> The average age of the farmer being near retirement age for the average American<sup>123</sup> is important for the purposes of this note for two reasons: one being that aging farmers are at a higher risk for injury, and second that they are more likely to overlook hazards that they have grown accustomed to over the forty-plus years of their career, which will in turn effect their employees.<sup>124</sup>

The issue is not that farmers are unaware of the dangers and hazards that present themselves daily on small farms but rather that farm owners view the risks associated with farming as an expectation that they have grown accustomed to.<sup>125</sup> The following comment from a farm operator illustrates the latter point:

You’re... in a wide-open area running that machine thinking you ain’t got a problem to worry about. You ain’t going to strike anything. All you got to do is keep your eyes up front. Then all of a sudden you’ll stop, you got a problem so you start backing up the machine, next thing you know, you’re backing up over somebody because they didn’t think to get out of the way because they thought you were going to keep going forward.<sup>126</sup>

This is an example of a scenario that could present itself daily. Most importantly, this accident took place in an environment that appeared to be safe. The driver was likely skilled in operating the tractor and had probably performed the specific job countless times. Yet, negligence might still be

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<sup>121</sup> Petty, *supra* note 116.

<sup>122</sup> Economic Research Service, *Beginning Farmers and Age Distribution of Farmers*, UNITED STATES DEP’T. OF AGRIC. <https://www.ers.usda.gov/topics/farm-economy/beginning-disadvantaged-farmers/beginning-farmers-and-age-distribution-of-farmers/> (Last Updated: Apr. 13, 2017).

<sup>123</sup> Kathleen Elkins, *Americans Retire 8 Years Later than China-Here’s the Retirement Age Around the World*, CNBC (Aug. 15, 2017), <https://www.cnbc.com/2017/08/15/the-average-retirement-age-in-the-us-and-other-countries.html>.

<sup>124</sup> Anne Collins McLaughlin & John F. Sprufera, *Aging Farmers Are at High Risk for Injuries and Fatalities: How Human-Factors Research and Application Can Help*, 72 NC MEDICAL JOURNAL 481, 481-83 (2016), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.1969&rep=rep1&type=pdf>.

<sup>125</sup> See Anne Collins McLaughlin & Christopher B. Mayhorn, *Avoiding Harm on the Farm: Human Factors*, 10 NORTH CAROLINA STATE UNIVERSITY 26, 32 (Jan. 2011), [https://www.researchgate.net/publication/279725569\\_Avoiding\\_harm\\_on\\_the\\_farm\\_Human\\_factors](https://www.researchgate.net/publication/279725569_Avoiding_harm_on_the_farm_Human_factors).

<sup>126</sup> *Id.*

found on part of the employer due to a surface level analysis of the duty to provide a reasonably safe place to work to employees.

*2. The Court's Tendency to Overlook Factors that are Necessary to Take into Consideration when Determining Whether a Farm Owner has Breached the Duty of Care to Provide Employees with a Reasonably Safe Place to Work*

The duty of reasonable or ordinary care to provide employees a safe place to work is generally established by that standard of care exercised by prudent employers in similar occupations.<sup>127</sup> However, courts do not use this standard to the degree of particularity necessary when applied to the small farm employer.

In cases where the employee has brought a negligence suit against the employer for claims relating to negligent supervision, hiring, or retention of the employee, there has been little to no comparison of the standard hiring practice or supervision standards as used by farmers of a similarly sized farm.<sup>128</sup> Likewise, in cases where the employee has claimed the employer's breach of duty to provide a reasonably safe place to work, the court has often failed to take into consideration the multiple factors discussed below in this note. The peculiarity about the farming industry is that the more expertise the farmer has the more likely injury is to occur.<sup>129</sup> Research studies, such as the report published in the *Journal of Agricultural Safety and Health*, have found that in the deeply rooted traditional culture of farming, an industry so historically bound up of family and self-regulation, there is very minimal evidence that farm safety educational programs are even effective.<sup>130</sup> This finding is contrary to the holding of cases where the court has seemed to insinuate that, if only there was more training, more supervision, or better communication, a seemingly obvious and easily avoidable injury would not have occurred, as in *Stone v. Von Eye Farms*.<sup>131</sup>

Stone's argument, that the employee who accidentally backed up when Stone was behind the tractor was not properly trained by Von Eyes, is arguably an example of holding the farmer to an unreasonable standard of care considering the circumstances. However, it is unclear as to what those circumstances were because the court, as this note proposes, did not properly tailor its analysis by employing the most important factors when considering a small farm working environment dispute.

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<sup>127</sup> 2 AM. JUR. 2D Proof of Facts § 517.

<sup>128</sup> See *Simmons v. Porter*, 298 Kan. 299 (2013); See also *Stone v. Von Eye*, 741 N.W. 2d 767.

<sup>129</sup> McLaughlin & Mayhorn, *supra* note 125.

<sup>130</sup> Juha Suutarinen, *Management as a Risk Factor for Farm Injuries*, 10 J. OF AGRIC. SAFETY AND HEALTH OF ASAE 39, 39 (July 2003), [http://www.mtt.fi/julkaisut/oa/v10\(1\)%2039-50.pdf](http://www.mtt.fi/julkaisut/oa/v10(1)%2039-50.pdf).

<sup>131</sup> See *Stone v. Von Eye*, 741 N.W. 2d 767 (2007).

It is well established law that a farmer, like any other employer, must exercise ordinary care for the safety of employees,<sup>132</sup> and must use reasonable care in selecting and retaining employees.<sup>133</sup> However, in the industry of small farming, where the farms are exempt from OSHA and Workers' Compensation laws, the court must consider this standard as specific to what a reasonably prudent farmer of a similarly sized farm in the same region and engaged in the same type of agricultural pursuit would do.

#### IV. PROPOSAL

Establishing the duty of care required to provide a reasonably safe place to work in the agricultural environment is a challenging task even on those farms that are subject to OSHA, but even more so in regard to the small farms at focus in this note. Small farms exempted from OSHA and workers' compensation laws are subject to common law tort principles, which are too broad when applied to the hazardous, unique industry of agriculture. The constantly changing work environment, the physically demanding labor, and the numerous hazards that farmers and farm employees come in contact with on a daily basis leave the court with a complex dilemma when determining whether or not the farm employer has breached his or her duty of care to provide a reasonably safe place to work to their employee.

The court decisions discussed in this note may not appear unreasonable without first having a deeper understanding of the small farm working environment, the relationship between the farm employer and farm employee, and the broad variety of potential dangers that occur daily. Many judges, attorneys, and members of the jury do not have a farming background, or perhaps have never even set foot on a farm. The result is the finding of a breach of duty of care on the part of the farm employer in cases where the precaution necessary to prevent the injury is unreasonable in consideration of the small farm working environment.

Common law tort principles, specifically the components of foreseeability and the reasonable person standard,<sup>134</sup> as currently applied to disputes between employers and employees of small farms are prone to yielding unfair, inconsistent results. These inconsistent results offer no relief to the underlying issue of this note: small farms have an extremely high injury and fatality rate but continue to fly under the radar of federal oversight and

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<sup>132</sup> See *West v. Sonke*, 132 Idaho 133, 968 P. 2d 228 (1998) (farm employers have a duty to exercise reasonable care in ensuring that inexperienced farm employees are equipped to deal with hazards inherent to their business); see also Barry A. Lindahl, 4 MODERN TORT LAW: LIABILITY AND LITIGATION SECTION 43:45 (2d ed. June 2018), <https://1.next.westlaw.com/Document/I6634c07c196711da83ab88132c05c00/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Category%29>.

<sup>133</sup> Looney and Copeland, *supra* note 10.

<sup>134</sup> *Gallick v. B & O R.R.*, 372 U.S. 108, 118 (1963).

thus are not bound by OSHA but are held to an unclear standard of some indiscernible sort. No amount of misguided or inconsistent court decisions will result in safer working conditions on the farm. In other words, the court should not, and cannot, compensate for the lack of health and safety enforcement on small farms by finding a breach of duty of care to provide a reasonably safe place to work, when in actuality that farmer acted how a reasonable, similarly situated farmer would act in the same or similar circumstance.

This note provides a solution to the deficient areas in the court's decision-making process when hearing disputes between the farm employee and the farm employer by proposing a set of specific factors for the court to weigh. At the core of these factors is the key concept of which this note is built upon: that the farming industry is inherently dangerous and is also very unique, and these characteristics in conjunction with the fact that small farms are often left on their own to implement proper safety strategies, lead to the inevitably high possibility that often times the farm owners' attempts will never be adequate in protecting against the broad array of hazards the farming environment presents. Therefore, the court must cease treating the farming industry as if the daily tasks are carried out in a typical work environment. The reality is that the environment farmers work in is subject to numerous uncontrollable working conditions on any given day, and that the proximity between the principal of the farm and the employee may be very distant throughout the day, if any contact occurs whatsoever. In addition to appreciating the uniqueness of agriculture, the court must consider the specific region the case arises out of, the type of farm that is in front of the court, and the typical practices in that surrounding area of comparable farms of similar size and concentration.

This note proposes four major factors to consider when hearing disputes between farm employers and employees based on the employer's breach of his or her duty to provide a reasonably safe place to work along with the basic guideline questions that make up each major category of factors. The full factors test, with attendant sub-factors, may be outlined as follows:

- A. The characteristics of the specific employee
  1. Length of time the employee has worked on the particular farm
  2. Employee's past work history concerning the same work or very similar work to the task that gave rise to the injury at issue
- B. The relationship between the employer and the employee involving the work at issue
  1. Whether or not the farmer directed the employee to engage in the task
  2. Whether the employer provided guidance or instruction in the past on this work
  3. Whether the employer created the risk

- C. How the farm at issue compares to other similarly situated farms
  - 1. How other farmers instruct their employees on the task at issue
  - 2. Whether employees on similarly situated farms commonly perform this type of work
  - 3. Whether the risk that caused this injury is often present on other farms
  - 4. Whether there is any training required for the specific task at issue
- D. The characteristics of the farm at issue
  - 1. The type of farm involved
  - 2. The region of the country
  - 3. Monetary figures
  - 4. The employer/employee proximity

While lengthy, this test accounts for the key concept at issue: that the farming industry is inherently dangerous and very unique. Each part of the test is discussed below.

#### A. The Characteristics of the Specific Employee

This factor will enable the court to properly address the foreseeability component<sup>135</sup> when determining whether the small farm employer has breached his or her duty of care by considering the employee's experience, or lack of, with the particular task at hand. The two sub-factors that serve as guidelines are: the length of the time the employee has worked on the particular farm, and the employee's past work history concerning the same work or very similar work to the task that gave rise to the injury at issue.

##### 1. *The Length of Time the Employee Has Worked on the Farm at Issue*

If the injury at issue occurred in the course of regular employment involving a potential danger that is essentially inherent in the employee's general duties and the particular employee has worked on the farm for a substantial amount of time, which will vary according to the particular situation, the court should be more reluctant to find liability on behalf of the farm employer as opposed to a fresh employee who has only worked on the particular farm for a couple of weeks.

Tasks that are not necessarily dangerous or hazardous but do have the potential of causing injury if done incorrectly are especially relevant to this sub-factor. For example, in the situation of an employee on a hog farm, a typical work assignment might be to check on or to change the positions of

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<sup>135</sup> See *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E. 3d 384, 389 (2016) (explaining that foreseeability is not only a component of proximate cause but also a component of the duty element of negligence).



piglets inside of a farrowing house.<sup>136</sup> Here, the sow might be on edge and may become aggressive if she feels that her young are threatened.<sup>137</sup> In the instance that a piglet would need to be removed from the farrowing quarters, a new employee might assume he may simply enter the pen and remove the piglet. However, a seasoned hog farmer knows that extra care must be taken when removing a piglet from a protective sow.<sup>138</sup> To avoid being bitten by the sow, the employee should enter the pen from the rear, rather than the front, and should carry a solid partition to create a barrier between himself and the sow prior to attempting to remove a piglet.<sup>139</sup>

The length of time the employee has worked on the particular farm at issue is relevant in the latter instance or to any similar instance. These types of tasks can be safely performed if the employee is aware of the safety procedures that need to be undertaken and is familiar with the process. However, a new employee may be unaware of the potential danger the task may pose if not properly performed.

## 2. *The Employee's Past Work History Concerning the Work that Gave Rise to the Injury*

This sub-factor is most easily illustrated by example. A cattle farmer who hires an employee who has previously worked on a cattle farm for ten years should expect that the employee has basic knowledge of how to safely herd and feed cattle, as well as basic knowledge of the size and power of cattle. However, a cattle farmer who hires an employee who has no experience with livestock or whom lacks a farming background in general, might be ignorant of the potential danger that cattle pose.<sup>140</sup> Thus, if an employer directs an employee to round up the cattle knowing of either the employee's brief time working on the employer's farm or lack of past work experience and the employee is injured by a foreseeable risk caused by the

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<sup>136</sup> See Duane E. Reese & W. E. Morgan Morrow, *Baby Pig Management- Birth to Weaning*, COOPERATIVE EXTENSION (Dec. 04, 2015), <https://articles.extension.org/pages/27050/baby-pig-management-birth-to-weaning>; see also Kristen Lie-Nielson, *Swine Farrowing Barns*, HOBBY FARMS (Apr. 1, 2016), <https://www.hobbyfarms.com/swine-farrowing-barns/> (explaining that a farrowing barn is a building that serves the purpose of ensuring piglets' proper nourishment and safety, by complying with certain pen size requirements, temperatures, moist levels, and space needs).

<sup>137</sup> National Ag Safety Database, *Handling Farm Animals*, FARM SAFETY ASSOCIATION (2002), <http://nasdonline.org/44/d001612/handling-farm-animals-safely.html>.

<sup>138</sup> See Cheryl Day, *Handling Sows in Open Pens Requires Thinking Differently*, NAT'L HOG FARMER (Mar. 13, 2018), <https://www.nationalhogfarmer.com/animal-welfare/handling-sows-open-pens-requires-thinking-differently>.

<sup>139</sup> Reese & Morrow, *supra* note 136.

<sup>140</sup> Natalina Sents, *6 Ways to Stay Safe While Handling Cattle*, SUCCESSFUL FARMING (July 16, 2018), <https://www.agriculture.com/livestock/cattle/6-ways-to-stay-safe-while-handling-cattle>.

potentially dangerous powerfulness and aggressiveness of cattle, the employee will have an easier time establishing liability.

#### B. The Relationship Between the Employer and the Employee Involving the Work at Issue

The relationship between the employer and employee regarding the task at issue is important to consider for purposes of deciding whether the farmer was negligent. This factor builds on the first factor but concentrates more on the relationship between the employee and the employer in regard to the specific task or hazard that gave rise to the issue, rather than solely focusing on the employee's degree of skill/familiarity with the hazard. Three sub-factors should be considered here. First, the court should consider whether or not the farmer directed the employee to engage in the task. Second, whether the employer provided guidance or instruction in the past on this work. Third, whether the employer created the risk.

##### *1. Whether the Employer Directed the Employee to Engage in the Work*

If an employer directed the employee to engage in the particular type of work or to engage in a task that would involve the hazard that gave rise to the injury at issue, the employer will have more difficulty in arguing that he was not negligent in regard to the foreseeability component.<sup>141</sup> However, the court must keep at the center of its focus what exactly caused the injury at hand. If the employer directed the employee to engage in a particular type of work in which the employer had good reason to know that the employee was aware of the hazards inherent in that task (as will be determined by considering the first major factor proposed above), then the employer may still argue that he did not breach his duty in providing a reasonably safe place to work. Still, the employer's argument would only be successful if he had properly instructed the employee on how to complete the task before-hand. This contingency leads to the second sub-factor, discussed below.

On the other hand, if the employer knew of a particular hazard that is not typically associated with the task performed or if the employer knew that the employee required further guidance on a task, and the employee ended up getting injured, this sub-factor would then fall in favor of the employee. An example would be if a farm employer instructed an employee to mow a roadside that was especially steep. Even if the employee had mowed roadsides twenty times before in that same tractor, the employer would need

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<sup>141</sup> 20 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 95.28 (2019) (citing *Grussinger v. Binger*, 262 Minn. 345, 114 N.W. 2d 699 (1962) and explaining that that defense of open and obvious dangers does not apply when there exists an employer-employee relationship and the employee is performing duties in compliance with employer's instructions).

to at least warn, and perhaps even train the employee depending on the circumstances, about the peculiar steepness and potential hazard the hill at issue presents.

### 2. *Whether the Employer Provided Guidance/Instruction in the Past to this Work*

This sub-factor was referenced in the immediately preceding sub-factor. The guidance, or lack of, that an employer provided in prior circumstances to the employee regarding the specific work or task that gave rise to the injury should be considered as relevant in regard to the foreseeability issue. A good example of how this sub-factor would work in application is the *Hanke v. Wacker* case, discussed above.<sup>142</sup> Had Wacker explicitly told Hanke to not ever attempt to separate two fighting boars alone the court should have found no liability on behalf of Wacker when Hanke proceeded to separate the angered, fighting boars by himself.<sup>143</sup> The reason being that an instance could always arise from a variety of circumstances on a hog farm consisting of hundreds of large hogs and it would be unreasonable to hold the farm employer liable for the employee's voluntary refusal to follow instructions in an industry so full of hazards.

### 3. *Whether the Employer Created the Risk*

If the employer created the risk, the likelihood of liability will consequently be higher because of the foreseeability component.<sup>144</sup> However, even if the employer created the risk, it still should not necessarily serve as conclusive evidence of the breach of the duty to provide a reasonably safe place to work. This goes back to one of the major themes of this note, that the small farm working environment is unique, complex, and hazardous.<sup>145</sup>

It is important to reemphasize that the employee must not be deemed to have consented to the employer's negligence, but rather the reality is that the small farm working environment, in light of the low resources and lack of

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<sup>142</sup> *Hanke v. Wacker*, 576 N.E.2d 1113, 1115 (Ill. App. Ct. 1991).

<sup>143</sup> *Id.*

<sup>144</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 3 (Proposed Final Draft No. 1, 2005) ("A person acts negligently if the person does not exercise reasonable care under all circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.").

<sup>145</sup> Arthur L. Frank, et al., *Issues of Agricultural Safety and Health*, ANNU. REV. PUBLIC HEALTH 225, 230 (2004), <https://www.annualreviews.org/doi/pdf/10.1146/annurev.publhealth.25.101802.123007>.

federal oversight, is prone to farm owners overlooking or overseeing potential hazards created by a certain setup of chemicals, of machinery placement, of animal grouping, and the list continues.<sup>146</sup> Therefore, the court must consider the circumstances of the particular risk created.

For example, if the employer was careless in creating the risk, such as instructing an employee to spray weeds using chemicals kept in a defective container of the employer's choosing and the employee was injured as a result, the court should find a breach of duty to provide a reasonably safe place to work on the employer's behalf.<sup>147</sup> On the other hand, a less straightforward question of liability would be as in the following hypothetical: An employer temporarily places chemicals in a defective container until he switches the chemicals to a proper container and instructs the employee as to the location of the chemicals and to abstain from making contact with the container, but the employee proceeds to partake in a particularly physically demanding task nearby the container, resulting in his falling into the chemicals. In this situation, the court should consider whether the employee acted reasonably, rather than finding the employer negligent by default.<sup>148</sup>

### C. How the Farm at Issue Compares to Other Similarly Situated Farms

This factor aids the court in fleshing out the reasonable person standard. The court will be better equipped in ensuring the case is decided on its merits rather than on sub-par knowledge or unfamiliarity with how the small farming industry works by comparing and contrasting how other farm employers direct or instruct their employees to perform the task at hand (or not to) and by considering the type of environment that other similarly situated farmers provide to their employees. The sub-factors the court should consider when determining whether the farm employer at issue has acted how a reasonably situated farmer would act in similar circumstances are as follows: First, how other farmers instruct their employees on the task at issue. Second, whether employees on similarly situated farms commonly perform

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<sup>146</sup> See Wyatt Bechtel, *Don't Overlook Employee Safety*, AG WEB J. (Dec. 31, 2018 12:30 pm), <https://www.agweb.com/article/dont-overlook-employee-safety/>.

<sup>147</sup> For an example of the extent of oversight required for safekeeping and storage of chemicals, see Bruce Browne, *Storing Pesticides Safely On Farm*, DEPARTMENT OF PRIMARY INDUSTRIES (JAN. 2016), [https://www.dpi.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0004/186394/storing-pesticides.pdf](https://www.dpi.nsw.gov.au/__data/assets/pdf_file/0004/186394/storing-pesticides.pdf); see also Sharon Gripp, *Pesticide Storage and Security*, PENN STATE EXT. (Sept. 12, 2017), <https://extension.psu.edu/pesticide-storage-and-security>.

<sup>148</sup> *Ring v. Kruse*, 158 Neb. 1, 8 (1954) (quoting 56 C.J.S., *Master and Servant*, § 433, p. 1258) (“In the absence of any statutory regulation of the subject, where a servant continues work with knowledge, actual or constructive, of dangers which an ordinarily prudent man would refuse to subject himself to, he is guilty of contributory negligence, particularly where he has created the danger.”).

this type of work. Third, whether the risk that caused this injury is often present on other farms. Fourth, whether there is any training required for the specific task at issue.

These sub-factors should be weighed as a balancing test. For example, if a farmer instructs his employee to climb and descend from the grain cart in a certain manner, and other farm employers also instruct their employees the same way and often assign them with this task, then this should not be a conclusive indicator that the farmer was not negligent. This is because with commonly performed tasks, the first and second sub-factors may often easily be met.

The court must also consider whether the risk that occurred performing the task at issue is often present on other farms. Using the grain cart example, if the particular ladder was prone to becoming slick and the employer was negligent in discovering this issue or knew of the issue yet directed the employees to proceed anyway, this may be a risk unique to that farm and thus not present on other farms.

The last sub-factor is important to consider because an employee might claim he or she was not properly trained to perform the task at issue. However, most work carried out on the small farm will not require any sophisticated training, certificate, or license of any means.<sup>149</sup> Therefore, after considering the first three sub-factors, if the court establishes that the task was carried out the same way or sufficiently similarly in the same manner that the task is performed on other farms, and if there was no unique risk present at the time of the injury, and finally that there is no formal training requisite for the task at hand, the court should be reluctant to find negligence on part of the employer.

#### D. The Characteristics of the Farm at Issue: Avoiding the “A Farm Is a Farm” Assumption

This factor is important largely from the standpoint of the risk-utility analysis. When determining whether or not a farm employer has breached his or her duty of care, the court must consider the precautions that would have possibly prevented the injury from occurring and whether or not those precautions are reasonable in light of the characteristics of the farm at issue. In other words, two people might identify themselves as farm owners, but their day to day tasks might look completely different. One farmer might use the same type of machinery every day for forty years, while a different farmer might never use that type of machinery a day of his or her life. For example, to subject a small-scale orange producer to the same duty analysis as a

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<sup>149</sup> *Agricultural Workers: Career, Salary and Education Information*, C. GRAD. JOBS, <https://collegegrad.com/careers/agricultural-workers> (last visited Mar. 2, 2019).

livestock and grain farm would simply be inadequate and unfair. The court must not ignore the unique characteristics, dangers, and hazards that each individual farm is subject to, but must consider the following sub-factors: the type of farm involved, the region of the country, monetary figures, and the employer/employee proximity.

These sub-factors should not be considered in isolation, but rather should be considered in light of one another. For example, sub-factor number three will necessarily be affected by sub-factor number one because the type of farm involved will dictate the necessary amount and variety of equipment needed.

### *1. The Type of Farm Involved*

This sub-factor includes considering the farm in light of the uniqueness of the specific commodity produced or the type of livestock raised. The type of farm the employee works on whether it be a livestock farm, which is further narrowed into the type of livestock, or a grain farm, which is further narrowed by the type of grain, or a produce farm, which is then narrowed to the specific type of produce, is critical when determining whether or not a farmer has breached his or her duty in providing a reasonably place safe to work. The reason behind the importance in considering this sub-factor is that the tools, equipment, environment, chemicals, and day to day interactions with the public or certain other hazards will vary largely across the various types of farms.

### *2. Region of the Country*

The region of the country must be considered because certain dangers, such as land structure differences and weather hazards, will be unique to the region at issue. For land structure differences, an example is mowing roadsides, spreading fertilizer, or spraying weeds in the flat lands of central Illinois contrasted with the hills of Kentucky. For weather hazards, an example is the increased fire hazard caused by the dryness of crops and warmer temperatures combined with combustible machinery in the more southern states, or the greater chance of fire spread while burning ditches in windier regions, such as the open prairies of central Illinois.

### *3. Monetary Figures*

This sub-factor is essential for the risk-utility analysis when considering whether or not an employer has breached his or her duty of care to provide a reasonably safe place to work based on a defect in machinery or other farm structure. In such cases, the court must consider the cost to the farmer of

constantly assuring that all possible defects are fixed at any given time. Given the amount of machinery that even a single farm might have, the precaution necessary to prevent the injury at issue might be unreasonable. One farmer's comment illustrates the reality of finding a farmer negligent in regard to a possibly unforeseeable malfunction in a given piece of machinery or structure: "You have to understand a lot of small farmers just get by, you know, little by little, just like somebody working paycheck to paycheck. If you put a lot of standards that would cause them to have to go out and buy all new equipment, they couldn't do that."<sup>150</sup>

Here, it is important to emphasize that this note is not arguing for a "get out of jail free card" for the small farm employer. In the instance where a piece of machinery is defective for weeks or months on end and the farmer does not fix the issue yet allows the employee to continue using the particular machinery, the employer should be found liable. However, in the instance that a piece of machinery is regularly checked upon and unexpectedly malfunctions, the farmer should not be found to have breached his or her duty of care to provide a reasonably safe place to work. The reason being that it would be nearly impossible for a farmer to ever hire any employees because of the numerous issues that could occur on the variety of complex equipment on the farm.

#### 4. *Employer/Employee Proximity*

This sub-factor considers the usual degree of closeness between the employer and employee when performing the type of work at issue. In small farming in which there is often only one farm owner who is likely performing similar tasks to his or her employee(s), the small farm employer has most likely hired the employee(s) with the hope that they will be able to independently accomplish tasks to allow work to get done efficiently and more quickly. A small grain farmer might be harvesting corn in one field while his employee is harvesting beans in a field ten miles away. If the employee engages in activity which the employer has not authorized or perhaps has even advised against in prior conversation and the employer is not there to oversee the employee's work, the court must take into consideration the previously discussed factors laid out above involving the employee's individual skill and ability, combined with whether or not this a work assignment that generally is monitored throughout the day.

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<sup>150</sup> Ian Kullgren, *Your Farm is Trying to Kill You*, POLITICO (Apr. 12, 2017), <https://www.politico.com/agenda/story/2017/04/the-most-dangerous-jobs-in-america-000395>.

### E. Rebuttal to Potential Criticisms of the Factor Approach

*1. This note does not propose the use of industry custom to set the standard of care in the small farming industry.*

First, the four main factors should not be misinterpreted as suggesting that farmers should be able to create industry custom as evidence in escaping liability. Rather, the need for a set of tailored factors is due to the fact that the farming industry is not one that many jurors or judges are familiar with.<sup>151</sup> Many people have driven trucks, ridden on a four-wheeler, and fed a farm animal, but most people are not experienced with operating tractors and combines, sorting large, aggressive livestock, and working with fertilizers and chemicals.<sup>152</sup> Therefore, in order to ensure a more informed, clear understanding of how the farming industry works, the court must consider how similarly situated farm employers manage their farms. The comparison of the farm at issue to similarly situated farms should be used to shed light on the inherent dangerousness, or lack of, that these activities normally present, in addition to whether the specific employee would understand those hazards, and how that hazard might be common or uncommon depending on the type of farm at issue and where the farm is located.

*2. The proposed factors will not waste judicial resources, but instead serve to form a template for identifying the most central issues and establishes guidelines for analyzing those issues to ensure a fair and just decision.*

Second, these factors will likely give rise to judicial economy and efficiency concerns. While these factors certainly call for a careful consideration of the circumstances and events surrounding the particular injury at issue, the factors themselves are not complex. The purpose of these factors is to make a complex industry more readily able to be dealt with in a straightforward manner. The purpose is not to make the court or the jury more confused, but to offer clear guidelines that focus on the most defining and important characteristics of the small farm working environment. By taking these factors and applying them to the type farm at issue the court will be able to focus on the key points that will enable a merit-based decision.

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<sup>151</sup> *Disconnect Between Americans and their Food*, U.S. FARMERS & RANCHERS ALLIANCE (Sept. 22, 2011), <https://www.prnewswire.com/news-releases/nationwide-surveys-reveal-disconnect-between-americans-and-their-food-130336143.html> (“72 percent of consumers know nothing or very little about farming or ranching”).

<sup>152</sup> *Fast Facts About Agriculture*, AMERICAN FARM BUREAU FEDERATION (2017), <https://www.fb.org/newsroom/fast-facts> (farm and ranch families comprise just 2 percent of the U.S. population).



For example, after going through these factors the court should conclude that the farm employer at issue was not negligent if it finds a grain farmer located in central Illinois instructed his or her employee of fifteen years to begin harvesting a field, and the employee took it upon his or herself to additionally haul the grain into the elevator using the farm's semi, a task the employee had never done before nor was instructed to do. If the employee is injured in this situation, the court should not find negligence on part of the farm owner. To put a slight spin on the previous hypothetical, if the employee decided to harvest the field, a task the employee had done many years for the past ten or so falls, but tried a new strategy to perform the task at issue and was injured, there should likely be no finding of negligence on behalf of the farm owner.

On the other hand, the court might be faced with a situation in which liability is clear if it finds that the farm at issue is a dairy farm located in Wisconsin, that the employee at issue had worked there for fifteen years, and that the farm employer had recently purchased hogs and told the employee to feed and sort the hogs without any prior training or guidance. If the employee followed these directions and was injured in the course of carrying out this task, the court should find that the farmer breached his duty of care.

Concededly, these appear to be two straightforward cases. These two hypotheticals highlight the important point that not all of the factors listed above always need to be employed. Still, this is merely the seemingly easy result *after* getting through the factors. In either of these cases there very well could have existed numerous other arguments made by both sides ranging from what the typical day to day work involved to the knowledge level of the employee in regard to the specific task at issue performed. Other arguments might include disputes over whether the employer should have been supervising the employee at the time or how dangerous the task at issue truly was. By applying the proposed factors, the court is now equipped to face all of these claims and conclude based on accurate, informed consideration of how the farm at issue operates, and how the employer-employee relationship at issue *should* operate.

### 3. *Expert testimony is not necessary in assessing these factors.*

The type of small farming cases at the focus of this note typically do not involve the resolving of issues requiring an expert witness. The typical cases where expert testimony is actually needed involve evidence regarding matters requiring "scientific, technical or specialized knowledge."<sup>153</sup> Illinois

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<sup>153</sup> Douglas R. Heise, *When Do You Need an Expert Witness*, 25<sup>TH</sup> ANNUAL CLAIMS HANDLING SEMINARS: FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR K-3, [http://www.heyloyster.com/\\_data/files/Seminar\\_2010/2010\\_CP\\_K\\_DRH.pdf](http://www.heyloyster.com/_data/files/Seminar_2010/2010_CP_K_DRH.pdf).

law, for example, deems expert testimony proper when “the subject matter of the inquiry is of such a character that only persons of special skill or experience in that area are capable of forming a correct judgment with respect to the applicable facts.”<sup>154</sup> This note has emphasized the complexity of farming throughout, as well as the court’s weakness in understanding and appreciating some of the risks and hazards involved in farming. However, this note does not suggest that the potential issues that arise in these negligence suits brought by farm employees against their employers present highly technical or scientific issues to the extent that their comprehension is beyond understanding without the explanation of an expert.

The emphasis on the theory that there exists more hazards and dangers in the small farming working environment than what most courts, jurors, and the general public realize is to highlight the importance of considering whether each proposed factor applies or is in dispute in the case at hand. This note proposes that the factors are needed to make the court and the jurors aware of the hazards and dangers that may seem non-existent or at least not very serious. Additionally, the factors are necessary to make clear that no two farms are exactly alike, and especially that no farm employer/farm employee relationship is exactly the same.

These factors merely mandate that the important characteristics that weigh on the liability of the farm employer at issue must be considered. This ensures that a case will be decided by an informed analysis, rather than based on incorrect assumptions of how the small farming industry works. The factors proposed in this note, including the characteristics of the employee, the relationship between the employer and employee, the comparison of the farm at issue to similarly situation farms, and the specific characteristics of the farm at issue, are none which require a highly scientific or technical understanding of any component on the small farm at issue.

## V. CONCLUSION

Small farms may be the exception when it comes to the law, but they are not the exception when it comes to the high risk of injury and fatality inherent in agriculture. Nor are small farms the exception regarding the duty of care to provide employees with a reasonably safe place to work. Farm employees are subject to hazards on the job every day, because a broad variety of hazards are intrinsic to the agricultural industry. A farm employee should never be deemed to have consented to the employer’s negligence, but at the same time, a small farm employer should not be deemed to have breached his or her duty of care to the employee based on unreasonable or illogical standards as applied to the small farm work environment.

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<sup>154</sup> *Id.* (quoting *Harvey v. Norfolk & W. Ry. Co.*, 390 N.E.2d 1384, 1390 (Ill. App. Ct. 1979)).



As currently applied, the common law duty to provide a reasonably safe place to work is unfair to small farmers who do not have the ability to supervise at all times. This is especially true when the injury is one that is inherent in farming, and the employer has provided adequate training and direction to the perform the task at issue. In order to reach consistent, fair results when hearing disputes between the farm employer and farm employee of small farms, the court should view the case consistent with the factors this note provides. The proposed factors will ensure that judges and juries know what's really going on down on the farm by providing a tailored, individualized analysis.