

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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Courtney Jayne, individually and as Personal Representative of the Estate of Maggie Zaiger,  Plaintiff,  vs.  City of Sioux Falls,  Defendant.	Case No. 18-4088  <b>COMPLAINT</b>
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Plaintiff, for her Complaint against the Defendant, states and alleges as follows:

### PLAIN STATEMENT OF THE CLAIM

1. On March 18, 2018, five-year-old Maggie Zaiger lost her life in Falls Park, a park that is owned and operated by the Defendant City of Sioux Falls. Falls Park surrounds a stretch of the Big Sioux River. Long before March 18, 2018, the Defendant had actual knowledge of a deadly danger in the park involving the river – a danger that many park visitors would not recognize. During spring runoff, the river’s heavy flow generates mountainous foam that looks like snow and can reach far onto the grounds beside the river, obscuring the river’s edge, as shown in this photograph.<sup>1</sup>



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<sup>1</sup> Photo found at <http://www.kdlt.com/2018/03/20/city-officials-react-to-falls-park-death/> (last accessed June 10, 2018).

Patrons approaching the foam do not realize the danger of slipping into the rushing river. If they do slip, the foam will hide their location and impede a rescue.

2. Long before March 18, 2018, the Defendant knew there had been at least two earlier foam-related drownings in Falls Park, and knew that the slippery rocks near the river had caused multiple other drownings or near-drownings, even when foam was not present. Long before March 18, 2018, a written report provided notice to the Defendant that the "**Best Practice**" would be if "**fencing** and increased patrol is used at Falls Park during the Spring run-off to prevent access to the natural rocks and water." (emphasis added). Despite this, the Defendant consciously chose not to use fencing to protect against the known danger of the river during the spring runoff.

3. On March 18, 2018, that choice predictably proved fatal. Five-year-old Maggie Zaiger and her family were in Falls Park, visiting from Iowa. They were on the bank opposite the Falls Overlook Café, just downstream from the Pedestrian Bridge, in an area where visitors were allowed and expected to be. There was foam nearby. This was precisely the same area involved in the two earlier foam-related drownings. As Maggie's mother turned away to assist her younger child, a witness saw

Maggie reach out toward the foam as if reaching for a handful of snow. Maggie then disappeared into the river. The foam impeded a rescue. Hidden by foam and ice, Maggie's last conscious interval of life was spent terrified, drowning, and alone in the river.

4. Maggie Zaiger's mother, Plaintiff Courtney Jayne, brings this action against the Defendant for its gross negligence and willful or wanton misconduct in consciously disregarding an unreasonable and substantial risk of serious bodily harm to patrons of Falls Park, resulting in Maggie Zaiger's death.

#### **PARTIES**

5. Maggie Jo Zaiger was born on September 19, 2012. She died on March 18, 2018 in Sioux Falls, South Dakota. Maggie Zaiger was a citizen of Iowa as of the date of her death.

6. Plaintiff Courtney L. Jayne is the mother of Maggie Zaiger and is the Administrator of the Estate of Maggie Zaiger pursuant to Letters of Appointment issued on May 1, 2018, a copy of which is attached hereto as Exhibit A. The Plaintiff is a citizen of Iowa. She brings this action pursuant to South Dakota Codified Laws, Ch. 21-5 (Wrongful Death) and Ch. 15-4 (Survival of Actions).

7. The Defendant, City of Sioux Falls, is a municipality in and a citizen of the state of South Dakota. The Defendant owns Falls Park and operates the park through its Parks and Recreation Board (the “Parks Board”) and other employees.

### **JURISDICTION AND VENUE**

8. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332. There is complete diversity and the amount in controversy exceeds \$75,000.

9. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) because the Defendant resides in this district and because a substantial part of the events or omissions giving rise to this claim occurred in this district.

### **ADDITIONAL FACTUAL ALLEGATIONS**

10. The Big Sioux River flows for approximately 419 miles through South Dakota before joining the Missouri River.

11. The Big Sioux River passes over a waterfall (“the Falls”) located in the Defendant City of Sioux Falls. The Defendant, through its Parks Board, has for many years taken advantage of the Falls by incorporating it as an attraction of Falls Park, which covers approximately 123 acres surrounding the Falls.

12. As of 2017, the Parks Board has 75 full-time employees and an annual budget of over \$18 million. Defendant makes money from its operation of Falls Park which among other things includes a café.

**Defendant's Knowledge of the Danger**

13. Long before March 18, 2018, the Defendant knew that the period of "spring runoff" created a deadly risk of drowning for patrons of Falls Park, especially children.

**Knowledge of the Heavy Water Flow at Spring Runoff**

14. Long before March 18, 2018, the Defendant knew that the flow of the Big Sioux River in Falls Park could run 3 to 6 times heavier than average during spring runoff, due to spring rains and snowmelt. The Big Sioux River flows at an average annual discharge of 246 cubic feet per second.<sup>2</sup> But historical data for the date of March 18th shows that on that day, the river's average discharge at the U.S.G.S. monitoring station in Sioux Falls is 726 cubic feet per second, almost 3 times heavier

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<sup>2</sup> South Dakota Department of Environment and Natural Resources, *Big Sioux River Watershed Strategic Plan*, at 9 (June 2016), available at <https://denr.sd.gov/dfta/wp/documents/LowerBigSiouxStrategicPlan2016.pdf> (last accessed April 25, 2018).

than the annual average.<sup>3</sup> On April 7th, the flow reaches a peak average discharge of 1,570 cubic feet per second, over 6 times the annual average.<sup>4</sup> The flow remains above average through June and July, per the historical data.<sup>5</sup>

**Knowledge of the Foam Build-Up During Spring Runoff**

15. Long before March 18, 2018, the Defendant knew that in the spring there is a dramatic build-up of white foam in parts of the Big Sioux River in Falls Park. This is the result of a high concentration of organic matter and fertilizers (such as phosphorus) being washed into the Big Sioux River by rain and “heavy turbulence from snowmelt.”<sup>6</sup> This foam accumulates in large piles in Falls Park and appears similar to a snowbank.

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<sup>3</sup> U.S.G.S., USGS Daily Statistics for South Dakota, available at [https://waterdata.usgs.gov/sd/nwis/dvstat/?site\\_no=06482000&por\\_06482000\\_128905=1413311,00060,128905](https://waterdata.usgs.gov/sd/nwis/dvstat/?site_no=06482000&por_06482000_128905=1413311,00060,128905) (last visited April 25, 2018).

<sup>4</sup> *Id.*

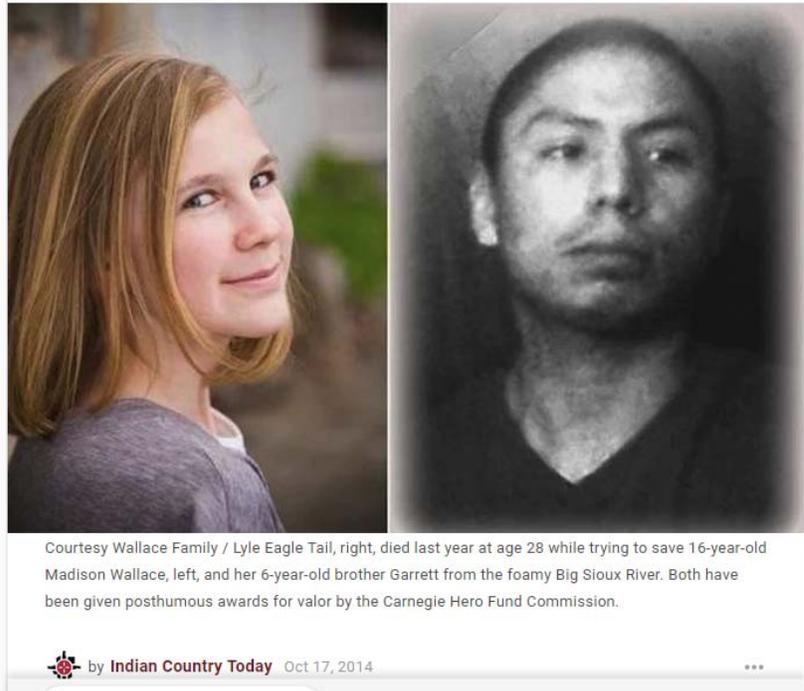
<sup>5</sup> *Id.*

<sup>6</sup> Friends of the Big Sioux River, *Why foam appears in lakes & streams*, available at <http://friendsofthebigsiouxriver.org/why-foam-appears-in-lakes-streams/> (last accessed April 25, 2018). See also: <http://www.keloland.com/news/article/news/foam-at-falls-makes-it-difficult-for-search-crews> (last accessed June 10, 2018)

*Knowledge of Two Prior Foam-Related Drownings during Spring Runoff*

16. The Defendant knew that on March 14, 2013, two people, Madison Wallace and Lyle Eagle Tail, had drowned in the Big Sioux River in Falls Park, and that the foam generated by the river during spring runoff – at precisely the same time of year that Maggie Zaiger would later drown – contributed to causing the deaths of these two people. Photographs of Madison Wallace and Lyle Eagle Tail are set out below:

**2013 Foam-Related Drowning Victims:  
Madison Wallace and Lyle Eagle Tail,<sup>7</sup>**



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<sup>7</sup> Photographs found at:  
[https://newsmaven.io/indiancountrytoday/archive/VofXv1j\\_d0y5uN2nLBwGcg/](https://newsmaven.io/indiancountrytoday/archive/VofXv1j_d0y5uN2nLBwGcg/)

17. On March 14, 2013, the Wallace family from Vermillion, S.D., was visiting Falls Park. Six-year-old Garrett Wallace was walking near the Pedestrian Bridge, across from the Falls Overlook Café, in precisely the same area where Maggie Zaiger would later lose her life.

18. As Garrett approached a large accumulation of foam, he “either fell into the frothing water or became obscured by the gathering foam that towered over him,” according to Sioux Falls Police Chief Doug Barthel, as reported in a contemporaneous CBS News report.<sup>8</sup>

19. Garrett’s 16-year-old sister, Madison Wallace, attempted to save him, but the foam was too thick.

20. A Lakota man, Lyle Eagle Tail, saw Madison go under and attempted to save her. He was able to locate and hold onto her for about five minutes before the current swept them both into the water.

21. Both Madison Wallace and Lyle Eagle Tail were drowned. Six-year-old Garrett was rescued.

22. Contemporaneous news reports underline the extent to which foam was implicated in these two deaths. The catastrophe began

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<sup>8</sup> Found at <https://www.cbsnews.com/news/body-recovered-of-teen-who-tried-to-save-her-little-brother-in-s-dakota-river/> (last accessed on June 10, 2018).

when 6-year-old Garret became obscured by foam, according to Police Chief Doug Barthel.<sup>9</sup> The foam then greatly impeded a rescue. The foam is shown in the 2013 Archive Video set out below.

**2013 Archive Video of Search for Wallace and Eagle Tail  
From Argus Leader News Story<sup>10</sup>**



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<sup>9</sup> Found at <https://www.cbsnews.com/news/body-recovered-of-teen-who-tried-to-save-her-little-brother-in-s-dakota-river/> (last accessed on June 10, 2018).

<sup>10</sup> Video found at: <https://www.argusleader.com/story/news/crime/2018/03/18/witness-girl-fell-into-river-falls-park/436385002/> (last accessed on June 10, 2018).

23. Jim Sideras of Sioux Falls Fire & Rescue was quoted as saying, "In some cases the foam was so thick that it was four to six feet deep, so you would lose your own people putting them into the water."<sup>11</sup>

24. Sideras explained that the foam was so thick firefighters were blowing it away with fire hoses.<sup>12</sup> The efforts of the rescuers are shown in the photograph below.

**Attempted Rescue of the 2013 Drowning Victims,  
From CBS News Story 3/15/2013<sup>13</sup>**



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<sup>11</sup> Found at <http://www.keloland.com/news/article/news/foam-at-falls-makes-it-difficult-for-search-crews> (last accessed on June 10, 2018).

<sup>12</sup> Found at <https://www.cbsnews.com/news/body-recovered-of-teen-who-tried-to-save-her-little-brother-in-s-dakota-river/> (last accessed on June 10, 2018).

<sup>13</sup> *Id.*

25. Sioux Falls City Environmental Manager Bob Kappel acknowledged the Defendant's recognition of the springtime foam "problem." As quoted in a contemporaneous 2013 news story, Mr. Kappel stated:

*It doesn't cause a problem until it hits the falls and then the big Sioux Falls agitates the water, allow the air to be entrapped in the water and it creates the foam....*

*The nature of the falls and the way the river turns there, it kind of entraps the foam in that area; there's the issue of the falls being the agitator; there's an entrapment area that doesn't allow the foam to move out. Also this time of year which probably made it worse is there is ice on the river. There's still ice and the ice blocks that foam from naturally washing down stream....*

*Unfortunately in the spring time they do become the largest washing machine in the state of SD which creates that foam.<sup>14</sup>*

**Knowledge of Other Drownings and Near-Drownings in Falls Park**

26. The Argus Leader reports that at least seven other drowning deaths have occurred in Falls Park since 1982, other than those involving Maggie Zaiger, Madison Wallace, and Lyle Eagle Tail. Four of those reportedly occurred downstream of the Pedestrian Bridge where Maggie

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<sup>14</sup> Found at: <http://www.keloland.com/news/article/news/foam-at-falls-makes-it-difficult-for-search-crews> (last accessed June 10, 2018)

Zaiger would lose her life. The Argus Leader also reports multiple rescues and near drownings.<sup>15</sup>

27. On information and belief, there have likely been many more rescues and close calls that are not documented in publicly available materials.

**Knowledge that “Best Practice” would be to Use a Fence**

28. Long before March 18, 2018, the Defendant knew from an inspection and written report that the “Best Practice” in Falls Park would be to use “fencing” to protect against the danger of the river during the spring runoff.

29. On information and belief, and for reasons unknown by the Plaintiff, only a limited portion of the report referenced in the previous paragraph has been released to the general public. That limited portion is referred to herein as the “2016 Report,” and is attached as Exhibit B to this Complaint and incorporated herein.

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<sup>15</sup> Michael Klinski, *Timeline: 10 deaths and dozens of rescues at Falls Park since 1980*, Argus Leader, March 20, 2018, available at <https://www.argusleader.com/story/news/crime/2018/03/20/timeline-10-deaths-and-dozens-rescues-falls-park-since-1980/442785002/> (last accessed June 9, 2018).

30. The 2016 Report purportedly was generated as part of a “workshop” or “internal training exercise” concerning “best practices for controlling key risk exposures for local government entities.” As part of the exercise, an outside consulting company conducted an “Inspection Training” at Falls Park and other locations during the week of July 25, 2016. Seven people from the Defendant City of Sioux Falls participated in the Inspection, among them Mike Hall, the Defendant’s Risk Manager, and Dave Fischer, Assistant Director of Parks and Recreation for the Defendant.

31. One portion of the 2016 Report resulting from that Inspection addressed “Common Risk Exposures.” One such exposure was noted to be “slips” on “exterior walking surfaces.” Under a column titled, “**Best Practice Controls Discussed or Observed,**” the 2016 Report states:

\* \* \*

- **Portable fencing and increased patrol is used at Falls Park during the Spring run-off to prevent access to the natural rocks and water.**

\* \* \*

32. On information and belief, long before March 18, 2018, the information quoted in the paragraph above was seen by the Defendant, and/or known of by the Defendant by reason of the direct participation

of Defendant's employees in the Inspection and discussion referenced in the quoted language.

33. On information and belief, long before March 18, 2018, the entire report generated from the Inspection was provided to the South Dakota Public Assurance Alliance (SDPAA), which provides liability coverage to the Defendant. The provision of the report to the SDPAA constituted notice to and knowledge of the report by the Defendant, for reasons including but not limited to the following:

- a. On information and belief, the Defendant is a "Member" of SDPAA and the SDPAA is owned by its Members;
- b. SDPAA characterizes itself as a "partner" of its Members;
- c. Two of Defendant's employees lead the SDPAA Board of Directors, as Chairman and Secretary respectively;
- d. The SDPAA Board's Secretary is Mike Hall, Defendant's Risk Manager, who directly participated in the Inspection described hereinabove; and
- e. The Defendant had access to and was entitled to risk control information from SDPAA, as SDPAA's Membership benefits include "Risk control surveys conducted on-site every three

years at no additional cost,” and “Risk control, loss control, and safety assistance at no additional cost.”

34. Despite Defendant’s knowledge that the “Best Practice” in Falls Park would be to use fencing to protect against the danger of the river during the spring runoff, the Defendant failed to implement such fencing, either portable or permanent. On March 18, 2018, no such fencing was in place.

35. At a time that is unknown to the Plaintiff, the Defendant placed various “Caution” signs in Falls Park.<sup>16</sup> No placement of signs could ever comply with the “Best Practice” documented in the 2016 Report, which was to use fencing to protect against the danger of the river during spring runoff. But in any event, none of the “Caution” signs even mentioned foam or warned about the known dangers of foam during the spring runoff. None of the signs warned that the foam existed, that it would attract children, that it would obscure the location of the children and the location of the river’s edge, and that it would greatly impede the chances of any rescue.

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<sup>16</sup> Found at: <https://www.argusleader.com/story/news/crime/2018/03/18/witness-girl-fell-into-river-falls-park/436385002/> (last accessed on June 10, 2018).

*The Drowning of Maggie Zaiger - March 18, 2018*

36. On March 18, 2018, Maggie Zaiger and her family visited Falls Park. Along with Maggie were Plaintiff and her two other children, ages ten and four. A friend of Plaintiff accompanied the family, along with two other children, ages fourteen and eleven. This was the first time Plaintiff had been to Falls Park. The Plaintiff does not know whether she walked by a caution sign. She does not recall noticing a caution sign.

37. After touring the Observation Tower at Falls Park, Plaintiff and her party walked out of the building in the direction of the Pedestrian Bridge.

38. Plaintiff turned momentarily to assist her four-year-old child. Then, according to a witness, Maggie reached out toward the foam as if reaching for a handful of snow. By the time Plaintiff turned her head back, Maggie had fallen into the river.

39. Plaintiff attempted to pull Maggie from the foam, but could not find her. Bystanders restrained Plaintiff from further searching and called for assistance. Emergency responders broke ice and took other steps to reduce the amount of foam in the area. It was approximately 20 minutes, or more, before emergency rescuers managed to pull Maggie

from the freezing, foam-filled and ice-filled river. The child was in cardiac arrest. She was rushed to the hospital, but could not be saved.

40. Maggie Zaiger is pictured in the photograph below.



*Damages*

41. As a direct result of Defendant's conduct, and the resulting death of Maggie Zaiger, the parents and next of kin of Maggie Zaiger have suffered, and in the future will suffer, permanent and substantial harm, losses, and damages, including but not limited to lifetime loss of support, advice, companionship, society, assistance, protection, counsel, comfort, care, guidance, and services of Maggie, and other pecuniary loss, all in an amount reasonably in excess of \$75,000.

42. As a direct result of Defendant's conduct, Maggie Zaiger suffered immense conscious pain, suffering, injury, and terror from the time of her fall into the Big Sioux River until her death as much as 20 or

more minutes later, resulting in damages collectible by the Plaintiff for the Estate of Maggie Zaiger in an amount reasonably in excess of \$75,000.

**COUNT I**  
**Wrongful Death**

43. Plaintiff realleges each of the preceding paragraphs as if fully set forth herein.

44. Defendant, as the owner and operator of Falls Park, had a duty not to engage in gross negligence or willful or wanton misconduct with regard to the safety of the park's patrons.

45. Defendant breached that duty by consciously disregarding an unreasonable and substantial risk of serious bodily harm to patrons of Falls Park.

46. Before Maggie Zaiger's drowning, the Defendant knew all of the following information.

47. Before Maggie Zaiger's drowning, the Defendant knew that mountains of foam generated by the Big Sioux River during spring runoff in Falls Park would appear like snow, would attract children, and would obscure the river's edge.

48. Before Maggie Zaiger's drowning, the Defendant knew that the generation of foam would occur at a time when the river ran exceedingly fast and could be filled with ice, making it highly dangerous.

49. Before Maggie Zaiger's drowning, the Defendant knew that children approaching the foam would not realize their danger of slipping into the rushing river.

50. Before Maggie Zaiger's drowning, the Defendant knew that if persons did slip into the river, the foam would hide their location and impede a rescue.

51. Before Maggie Zaiger's drowning, the Defendant knew that there had been at least two earlier foam-related drownings in Falls Park, in March of 2013.

52. Before Maggie Zaiger's drowning, the Defendant knew that the slippery rocks near and in the Big Sioux River in Falls Park had caused multiple other drownings or near-drownings, even when foam was not present.

53. Before Maggie Zaiger's drowning, the Defendant knew that the "Best Practice" at Falls Park was to use fencing and increased patrol during the period of spring runoff to prevent access to the natural rocks and water.

54. Despite all of this knowledge, the Defendant intentionally and consciously chose not to use fencing to protect against the known danger.

55. Defendant knew that, in all probability, serious harm would result from its decision to ignore the need for a fence to protect against the danger of the Big Sioux River during the period of spring runoff.

56. In intentionally and consciously choosing to ignore the need for fencing to protect against that danger, Defendant's conduct was grossly negligent and in willful and wanton disregard of the rights of Maggie Zaiger and her parents and next of kin.

57. Maggie Zaiger's drowning was the direct and proximate result of gross negligence and willful or wanton misconduct on the part of the Defendant in consciously disregarding an unreasonable and substantial risk of serious bodily harm to patrons of Falls Park.

58. Use of a fence would have been entirely feasible, and would have prevented the drowning of Maggie Zaiger.

59. Plaintiff is entitled to recover from Defendant all damages resulting from Maggie Zaiger's wrongful death, including but not limited to lifetime loss of support, advice, counsel, comfort, assistance, protection, care, guidance, services, and companionship of Maggie, and other pecuniary loss.

**COUNT II**  
**Maggie Zaiger's Conscious Pain and Suffering**

60. Plaintiff realleges each of the preceding paragraphs as if fully set forth herein.

61. As a direct and proximate result of the gross negligence and willful or wanton misconduct of Defendant, Maggie Zaiger was subjected to extreme terror, pain, suffering, and injury, all of which permit recovery as survival damages, in an amount to be determined at trial.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment against Defendant as follows:

1. Awarding Plaintiff damages against Defendant according to proof at trial in an amount exceeding \$75,000;
2. Awarding Plaintiff pre-judgment and post-judgment interest according to law; and
3. Awarding Plaintiff costs, disbursements, and such additional relief as the Court may deem just and proper.

July 26, 2018

**Robins Kaplan LLP**

By: /s/ Brendan V. Johnson  
Brendan V. Johnson (S.D. # 3263)  
Timothy W. Billion (S.D. # 4641)

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# **EXHIBIT A**

IN THE IOWA DISTRICT COURT FOR AUDUBON COUNTY

IN THE MATTER OF THE  
ESTATE OF MAGGIE JO ZAIGER

Case No. 04051 ESPR009061

**Letters of Appointment**

Docket Event Code: LEAP

KNOW ALL PERSONS BY THESE PRESENTS:

That having been duly appointed and qualified as Administrator of the above entitled matter,

Courtney Jayne

is vested with all powers authorized by law in the premises.

Letters issued: 05/01/18



/s/ Kim Johnson

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Clerk of Court/Designee  
AUDUBON County