

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**DIANE D. LOCKLING, Personal
Representative of the Estate of ROBERT
E. LOCKLING, Deceased,**

Plaintiff,

vs.

LOREN AMMON, et al.,

Defendants.

Case No. CI99-92

ORDER ON DEMURRERS

DATE OF HEARING: No hearing held.
DATE OF RENDITION: June 20, 2000.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
APPEARANCES: None in person or by telephone; on briefs:
For plaintiff: John C. Fowles, of The Bruckner Law Firm, P.C.
For defendants:
Ammon: Todd B. Vetter, of Gatz, Fitzgerald & Vetter.
Hansen: Terry M. Meinecke, of DeMars, Gordon, Olson & Shively.
SUBJECT OF ORDER: Demurrers of defendants Ammon and Hansen.
FINDINGS: The court finds and concludes that:

1. The parties had appeared for hearings, submitted briefs, and presented oral arguments on demurrers to previous versions of the petition. At the hearing on the demurrers to the Fifth Amended Petition, all counsel agreed to a procedure to waive hearing or arguments as to the contemplated demurrers to the anticipated Sixth Amended Petition and to submit the contemplated demurrers without argument unless noticed for hearing. No party noticed the present demurrers for hearing, and under the previous stipulated procedure, they are deemed as submitted. Further, counsel for plaintiff had advised that no further opportunity for amendment would be desired after the Sixth Amended Petition.

2. The court has now reviewed several iterations of briefs and heard the parties' arguments several times, and given considerable thought to the matter.

3. In *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 250, 533 N.W.2d 664, ___ (1995) (emphasis supplied), the Nebraska Supreme Court stated that, “[i]n order to invoke *res ipsa loquitur*, the plaintiff must first *prove* that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence.” Thus, the classification of the occurrence is an issue of *fact*.

4. In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Giese v. Stice*, 252 Neb. 913, 567 N.W.2d 156 (1997). In determining whether the cause of action has been stated, the petition is to be construed liberally. *Id.*

5. The Sixth Amended Petition alleges that “[a] 1000 to 1200 pound cow would not normally escape from a fenced pasture with at least three lines of barbed wire at all locations and four at other locations with no noticeable defect and apparently in good condition for a period of 10 or more hours in the absence of negligence”

6. The court concludes that such constitutes an allegation of fact that the court, in considering a demurrer, is required to accept as true. The court concludes that the allegation is sufficient to withstand a demurrer. The court’s conclusion is bolstered by the general rule that even a general allegation of negligence is good against a demurrer. *Giese v. Stice, supra*. See also *Coburn v. Reiser*, 254 Neb. 495, 577 N.W.2d 289 (1998); *McDaniel v. Farlow*, 132 Neb. 273, 271 N.W.2d 905 (1937).

7. However, the court must also consider defendant Hansen’s argument regarding the allegations concerning the exclusive control and management of the instrumentality causing the occurrence, i.e., the cow. The second element of *res ipsa loquitur* requires the plaintiff to prove that the instrumentality which produced the occurrence was under the exclusive control and management of the defendant. *Roberts v. Weber & Sons, Co., supra*.

8. As to the defendant Ammon, the allegations of the petition are clearly sufficient. The petition states a cause of action as to defendant Ammon. His demurrer must be overruled. It appears that the issue raised by the defendant Ammon is more appropriately considered upon a motion for summary judgment. Nothing contained in this order shall be deemed to preclude or invite any such motion.

9. However, as to defendant Hansen, in order to impute liability, the plaintiff relies upon allegations of joint enterprise or joint venture. The existence or nonexistence of a joint adventure is a question of fact for the jury's determination, although what constitutes a joint venture is a question of law. *Kelley Investment Co. v. Merrill, Lynch, Pierce, Fenner & Smith*, 386 F.2d 595 (8th Cir. 1967).

10. While used interchangeably by the plaintiff in the latest petition, joint enterprise appears to be limited to cases involving the imputation of negligence in connection with vehicular accidents. N.J.I.2d 6.40 at 6.40-5 (1995). In American courts generally, nonbusiness applications of joint venture go by the name of joint enterprise. *Id.* at 6.40-5-6.40-6. The relationship between defendant Ammon and defendant Hansen's decedent was clearly a business relationship. Thus, the court will consider the allegations here as allegations of a joint venture.

11. One critical element of a joint venture requires discussion. In a joint venture, each of the parties must have an equal voice in the manner of performance and control over the agencies used. *Global Credit Servs. v. Amisub*, 244 Neb. 681, 508 N.W.2d 836 (1993); *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978).

12. Although the plaintiff attempts to plead conclusions to escape the result, the facts pleaded clearly demonstrate the absence of such equal voice and control. The petition attaches and incorporates the written contract between the defendant Ammon and the defendant Hansen's decedent. That contract clearly and unambiguously states that Ammon was to provide all labor needed to supervise the cattle. None of the rights retained or duties imposed by the contract on Hansen's decedent afforded him any voice or control in the supervision of the cattle. The plaintiff failed to plead facts sufficient to establish a joint venture.

13. The petition fails to state a cause of action as to the defendant Hansen. Because the plaintiff's counsel informed the court that the Sixth Amended Petition represented the plaintiff's final effort, defendant Hansen's demurrer must be sustained without leave to amend.

14. However, in order that there be no question that this does not constitute a final order, the court expressly declines to dismiss the petition as to the defendant Hansen at this time. The sustaining of a general demurrer, not followed by a judgment of dismissal terminating the litigation, does not constitute

a final, appealable order. *Kinsey v. Colfer, Lyons, Wood, Malcom & Goodwin*, 258 Neb. 832, ___ N.W.2d___ (2000). The entry of an order of dismissal must await further developments in the case.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The demurrer of the defendant Ammon is overruled, and the defendant Ammon is allowed 14 days from the date of entry of this order to answer.

2. The demurrer of the defendant Hansen is sustained, and leave to amend the petition is denied.

3. This order is interlocutory in character and does not constitute a final order.

Signed in chambers at Ainsworth, Nebraska, on June 20, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Demurrers" entered denying demurrer of defendant Ammon, granting defendant Ammon 14 days to answer, sustaining demurrer of defendant Hansen, denying plaintiff further leave to amend the petition, and withholding dismissal of the petition as to defendant Hansen.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge