

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

SUMMARY JUDGMENT

DATE OF HEARING: November 16, 2000.

DATE OF RENDITION: January 31, 2001.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff: John C. Fowles, of The Bruckner Law Firm, P.C.

For defendants:

Ammon: C.J. Gatz, and on brief, Todd B. Vetter, of Gatz, Fitzgerald & Vetter.

Hansen: Terry M. Meinecke, of DeMars, Gordon, Olson & Shively.

SUBJECT OF ORDER: (1) defendant Ammon's motion for summary judgment, and (2) defendant Hansen's verbal motion to dismiss.

PROCEEDINGS: At the hearing, these proceedings occurred:

Evidence was adduced by defendant Ammon in support of his motion for summary judgment. The plaintiff adduced evidence in opposition to the motion. Arguments of counsel were heard. Briefs were submitted at or prior to the hearing. The matter was taken under advisement. The defendant Hansen verbally moved for dismissal of the plaintiff's sixth amended petition, as a demurrer of said defendant had previously been sustained. The plaintiff waived the advance notice of the motion required by Rule 8-3. Arguments of counsel were heard or waived. The matter was also taken under advisement.

FINDINGS: The court finds and concludes that:

1. The plaintiff seeks a judgment for the wrongful death of the plaintiff's decedent, which occurred when the decedent's motor vehicle struck a cow at night on a public road. The plaintiff alleges the defendants' negligence under the doctrine of *res ipsa loquitur*. The court previously sustained a demurrer by defendant Hansen without leave to amend, but deferred dismissal. The defendant Ammon's demurrer was overruled. The defendant Ammon now moves for summary judgment. In discussing the motion for summary judgment, the defendant Ammon will be referred to as "the defendant" without regard to defendant Hansen.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, ___ N.W.2d ___ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A *prima facie* case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a *prima facie* case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

3. As the defendant correctly states, merely pleading *res ipsa loquitur* does not preclude summary judgment. *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998). When the doctrine of *res ipsa loquitur* is utilized, the examination of whether there is a genuine issue of material fact must be related solely to the issues under the required elements of the doctrine. *Id.* If the doctrine is applicable, the inference of negligence itself presents a question of material fact, and summary judgment is improper. *Id.* If, however, the doctrine is inapplicable as a matter of law and there is no material question of fact regarding actionable negligence, summary judgment is proper. *Id.*

4. For purposes of the motion, the defendant conceded that a material dispute of fact exists as to the elements of the doctrine concerning exclusive control and absence of explanation. The defendant's arguments, and this court's attention, focuses solely on the element that the injury would not ordinarily occur in the absence of negligence.

5. Both parties' arguments rely heavily on *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995), which appears to be the only published Nebraska appellate decision applying *res ipsa loquitur* to escaped livestock.

6. The plaintiff's brief cites cases from other jurisdictions that the mere presence of livestock on the highway is sufficient to raise a permissible inference of negligence. See, e.g., *Scanlon v. Smith*, 404 P.2d 776 (Wash. 1965). In *Roberts*, the Nebraska Supreme Court rejected the contention that *res ipsa loquitur* is inapplicable to all escaped-livestock cases. But the *Roberts* court also determined that, "[d]epending on the factual situation presented in certain cases involving escaped livestock, it might be proper for the trial court to instruct the jury regarding *res ipsa loquitur*." *Roberts, supra* at 250, 533 N.W.2d at _____. That statement necessarily implies that, depending on the factual situation, it might be improper. In other words, mere escape is not sufficient to raise an inference of negligence. Thus, the Nebraska Supreme Court in *Roberts* committed Nebraska jurisprudence firmly against strict liability or an automatic inference of negligence in escaped-livestock cases.

7. This court agrees with the plaintiff's contention that the question cannot be viewed generally or in the abstract. The Supreme Court expressly rejected the Court of Appeals' general determination that cattle may escape from adequately constructed confines without negligence, and that such escape and appearance on a public highway is not so unusual that such an occurrence would not ordinarily occur in the

absence of negligence. *Roberts* teaches that the inquiry must be made in light of the specific facts of the particular case. Thus, the Oregon Supreme Court's articulation in *Watzig v. Tobin*, 642 P.2d 651, 655 (Ore. 1981) that the court must determine "whether a jury could reasonably find, under the evidence, that it is more probable than not that the escape of the cows would not have normally occurred in the absence of negligence and that the negligence was that of the defendants" appears consistent with the Nebraska law announced in *Roberts*. If a jury could not reasonably so find, then as a matter of law the doctrine does not apply.

8. The issue is not, as the defendant contends, simply whether a cow escaping from a three- and four-strand barbed wire fence in good condition is an event that would not ordinarily occur in the absence of negligence. Rather, the proper formulation of the issue requires this court to determine whether a jury could reasonably find that it is more probable than not that the escape of *this* cow from *this* three- and four-strand barbed wire fence would not have occurred in the absence of negligence, under the particular facts presented in this case. Of course, on the motion for summary judgment, this court must view those facts in the light most favorable to the plaintiff.

9. The defendant's affidavit states that, prior to the occurrence, he did not have knowledge of any propensity of this particular cow to escape from a three- and four-strand barbed wire fence in good condition. There is no evidence to the contrary. Of course, the defendant's lack of prior knowledge of specific propensity is not conclusive. It merely forecloses the possibility that this cow was particularly prone to escape, thereby altering the probabilities of escape.

10. The defendant's affidavit also addresses the specific issue considered here, albeit in a rather circuitous fashion. The facts expressly stated support the determination that no reasonable jury could conclude that it was more probable than not that this specific cow could not have escaped from this particular pasture through this particular fence in the absence of negligence. The affidavit meets the defendant's burden to adduce evidence establishing the absence of a genuine issue of material fact and that defendant is entitled to judgment as a matter of law.

11. The defendant also introduced several affidavits of area ranchers generally opining that it is possible in the normal course of events and without any person's fault for a cow weighing 1,000 to 1,200 pounds to escape from a pasture surrounded by three- and four-strand barbed wire fencing. As noted

above, the general proposition supported by these affidavits does not control. That does not render the affidavits worthless. The inferences arising as to the application of that concept to the specific situation lend some support to the defendant's required showing.

12. The deposition testimony of Deputy Sheriff Clarence Wrede provides even more persuasive evidence. His testimony regarding the good condition of the particular fence and the common nature of occurrence of cattle escaping from fences in good condition lends strong support to the defendant's required showing. Further, the affidavit of the Department of Roads traffic safety division employee lends further support to the common nature of the occurrence of escaping livestock and resulting collisions with motor vehicles in Holt County. The sheer numbers of collisions support the defendant's contention that such occurrences often happen without any negligence.

13. None of the plaintiff's evidence would tend to show that this particular cow would not have escaped this particular pasture through this particular fence in the absence of negligence.

14. The plaintiff presented some deposition testimony tending to show that this particular cow was out of the pasture and near the public road much earlier on the day of the collision. If it was proper for this court to weigh the credibility of the evidence purporting to make a specific identification of the cow as the same one later involved in the collision, that specific identification testimony would probably be rejected as lacking any persuasive value. However, on the motion for summary judgment, this court is not free to weigh credibility; indeed, the court must view that evidence in the light most favorable to the plaintiff. Viewed in that light, the court accepts such evidence as tending to show that this particular cow was observed earlier in the day outside of the pasture. However, this evidence did not in any way address the question of how the cow escaped from the pasture. None of the witnesses observing the earlier cow (whether or not he or she attempted to identify the earlier escaped cow as the same cow involved in the collision) made any observations regarding the method or means of escape of the cow from the pasture. It is evident that some of these witnesses are assuming that the cow was the same merely because of the later occurrence of the collision. In any event, the evidence is clear and undisputed that none of these people notified the defendant that the cow was out.

15. Although it was not cited by either party, this court has considered the decision in *Hand v. Starr*, 250 Neb. 377, 550 N.W.2d 646 (1996), in which the Supreme Court reversed a summary judgment granted by the district court to the cattle caretaker.

a. Although the Supreme Court did not specifically describe the petition, the plaintiff in *Hand* apparently did not rely upon the doctrine of *res ipsa loquitur*.

b. The *Hand* opinion describes the duty of a caretaker to confine livestock and to round up escaped livestock. However, *Hand* differs factually from the present case. In *Hand*, before the collision the caretaker was advised of the escape from the confinement pasture to another rancher's pasture some 12 to 15 miles away. An issue of material fact existed as to whether the caretaker was negligent in failing to timely round up and confine his cow once he had been apprised that it had escaped his pasture and traveled 12 to 15 miles. Here, there is no evidence that the defendant knew the cow had been out until after the accident, and no evidence of prior knowledge of any propensity of the animal to escape. The absence of notice factually distinguishes this case from *Hand*.

c. The issues in a case are framed by the pleadings. *City State Bank v. Holstine*, 260 Neb. 578, ___ N.W.2d ___ (2000). This court must view the evidence in the light of the issues framed by the pleadings, which alleges no specific acts of negligence and relies solely on *res ipsa loquitur*. As discussed above, the evidence does not support application of that doctrine in this factual setting.

d. Moreover, the doctrine of *res ipsa loquitur* cannot be applied if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident. *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968).

16. The plaintiff also relies on the decision in *Nuclear Corp. of America v. Lang*, 480 F.2d 990 (8th Cir. 1973) to support the presumptive application of *res ipsa loquitur* in escaped livestock cases. However, the Nebraska Supreme Court noted in *Roberts* that the *Lang* decision rested on flawed reasoning not supported by Nebraska law.

17. This court concludes that the defendant met his burden to show, as a matter of law, that no reasonable jury could conclude on this evidence that it was more probable than not that this specific cow would not have escaped from this particular pasture through this particular fence in the absence of

negligence. The burden then shifted to the plaintiff, who failed to meet her burden to show the existence of a genuine issue of fact. The defendant's motion for summary judgment should be sustained.

18. Because the motion for summary judgment should be sustained, the defendant Hansen's motion for dismissal should also be sustained and final judgment of dismissal entered upon the prior ruling sustaining that defendant's demurrer. As noted in the interlocutory order granting the demurrer, prior to the filing of the sixth amended petition, all of the parties including the plaintiff contemplated the demurrers that would follow and the plaintiff expressed the intention to stand upon the sixth amended petition and disclaimed any desire to further amend in the event that a demurrer was sustained.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The motion of defendant Ammon for summary judgment is granted.
2. The prior ruling granting the demurrer of the defendant Hansen to the sixth amended petition without leave to amend is reaffirmed.
3. JUDGMENT is entered dismissing the plaintiff's sixth amended petition as to all defendants with prejudice to future action at plaintiff's cost.

Signed in chambers at Ainsworth, Nebraska, on January 31, 2001.
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 ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Petition dismissed with prejudice at plaintiff's cost").
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Summary Judgment" entered granting defendant Ammon's motion for summary judgment, reaffirming order granting defendant Hansen's demurrer without leave to amend, and dismissing plaintiff's sixth amended petition with prejudice at plaintiff's cost.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge