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McLaughlin Freight Lines, Inc., an Iowa corporation, appellant, v. Marvin Gentrup, appellee.

798 N.W.2d 386

Filed June 10, 2011. No. S-10-637.

1. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Negligence: Presumptions.** The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed. Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.
5. **Negligence: Proof.** There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.
6. **Courts: Negligence: Proof.** The trial court should not weigh the evidence to determine whether res ipsa loquitur applies. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event.

Appeal from the District Court for Cuming County: Robert B. Ensz, Judge. Reversed and remanded for further proceedings.

Damien J. Wright, of Welch Law Firm, P.C., for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellee.

Heavican, C.J., Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

Gerrard, J.

This appeal rises out of a collision between a semi-trailer truck owned by McLaughlin Freight Lines, Inc. (McLaughlin),

and cattle owned by Marvin Gentrup. After the accident, McLaughlin filed this suit, seeking recovery for damages to its truck. McLaughlin's sole theory of recovery was premised on the doctrine of res ipsa loquitur. Gentrup moved for summary judgment. After a hearing, the district court determined that pursuant to Neb. Rev. Stat. § 25-21,274 (Reissue 2008), the fact that Gentrup's livestock escaped was not by itself sufficient to raise an inference of negligence against Gentrup, and sustained Gentrup's motion.

McLaughlin appeals. The primary issues presented on appeal are (1) whether the district court correctly applied the common-law principles of res ipsa loquitur and (2) whether § 25-21,274, which provides that the fact of escaped livestock is insufficient to raise an inference of negligence, supplants those common-law principles.

BACKGROUND

On the evening of May 13, 2009, Gentrup placed six cattle into a holding pen near his residence. Shortly after midnight on May 14, McLaughlin's truck collided with Gentrup's cattle on Nebraska State Highway 32. Though the driver of the truck was unharmed, the truck sustained damage. McLaughlin then filed this suit. Gentrup filed a motion for summary judgment, citing § 25-21,274 as support, and the following evidence was adduced at hearing:

The holding pen in which Gentrup had confined his cattle was 50 by 80 feet, constructed of steel, and secured to the ground by steel posts which were cemented into the ground. Gentrup testified that to secure the pen's gate, he wraps a chain around the gate once and places the chain into a latch. Gentrup stated that he then hangs the excess chain on the outside of the pen to prevent the cattle from disturbing it. Gentrup testified that on May 13, 2009, he put six cattle in the pen and secured the gate in his usual manner. Gentrup stated that though none of his cattle had ever "licked" or "rubbed [the chain] off" previously, he had heard of it happening to other ranchers and believed this was the most probable explanation for the escape of his livestock. Affidavits submitted by two cattle producers stated that the latching system used by Gentrup was common

in the industry. Gentrup stated that he had used the pen since 1993 without any cattle escaping.

Following the accident, Gentrup inspected the pen and found the fence intact, though the gate was open and all six cattle had escaped. Gentrup found two of his cattle dead on the highway; the other four were found alive in a nearby field.

At hearing, McLaughlin agreed that its sole theory of recovery was based upon res ipsa loquitur, as McLaughlin had no direct evidence of Gentrup's alleged negligence. The court noted that where the defendant presented uncontroverted evidence which indicated that there was no genuine issue of material fact as to whether the cattle would ordinarily escape through the gate in the absence of negligence, § 25-21,274 precluded McLaughlin's suit. McLaughlin appeals.

ASSIGNMENT OF ERROR

McLaughlin assigns, summarized and restated, that the district court erred when it granted summary judgment in Gentrup's favor.

STANDARD OF REVIEW

[1,2] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

ANALYSIS

McLaughlin's argument depends on the common-law tort doctrine of res ipsa loquitur. Gentrup's argument, on the other

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[1] *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010).

[2] *Id.*

[3] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

hand, depends upon § 25-21,274. We begin by reviewing the common-law doctrine and our relevant case law. Then, we must determine the effect that § 25-21,274 has on that analysis.

Res Ipsa Loquitur

[4,5] The doctrine of res ipsa loquitur is an exception to the general rule that negligence cannot be presumed.[4] Res ipsa loquitur is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected.[5] There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer.[6] We have noted that, in res ipsa loquitur cases,

> "[t]he plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event than that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion. Where no such balance of probabilities in favor of negligence can reasonably be found, res ipsa loquitur does not apply."[7]

[6] When deciding whether res ipsa loquitur applies, a court must determine whether evidence exists from which reasonable

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[4] See *Roberts v. Weber & Sons,* Co., 248 Neb. 243, 533 N.W.2d 664 (1995).

[5] See *id.*

[6] See *id.*

[7] *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 880, 485 N.W.2d 170, 176 (1992) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 39 (5th ed. 1984)).

persons can say that it is more likely than not that the three elements of res ipsa loquitur have been met. If such evidence is presented, then there exists an inference of negligence which presents a question of material fact, and summary judgment is improper.[8] The court should not weigh the evidence to determine whether res ipsa loquitur applies. Instead, the court must determine whether there is sufficient evidence from which reasonable persons could find that it is more likely than not that the three elements of res ipsa loquitur have been proved and that it is therefore more likely than not that there was negligence associated with the event.

In *Roberts v. Weber & Sons, Co.*,[9] we decided that res ipsa loquitur could apply in escaped livestock cases, and because of factual similarities that will become apparent, *Roberts* bears examining in some detail. The *Roberts* plaintiff's vehicle hit several of the defendant's cattle on a public highway at night, and filed suit, proceeding on a res ipsa loquitur theory. According to the defendant, the pen from which his cattle escaped was constructed of 2-inch steel pipe embedded in concrete with a 2-inch toprail and a "sucker rod" welded on the inside to the pen. The defendant claimed that his cattle pressed up against a gate, breaking the top hinge on the gate, which allowed the cattle to crawl over the gate and escape. The district court submitted the issue of res ipsa loquitur to the jury, which returned a verdict in favor of the plaintiff.

On appeal, we upheld the submission of a res ipsa loquitur instruction to the jury, holding that res ipsa loquitur could be applicable in escaped livestock cases depending on the factual situation presented. We noted that in order to determine whether res ipsa loquitur was applicable, the three elements of the doctrine must be examined. We then analyzed the first element, whether the occurrence was one which would not, in the ordinary course of things, happen in the absence of negligence. We determined that there was evidence that the construction of

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[8] See *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

[9] *Roberts v. Weber & Sons, Co., supra* note 4.

the pen was state of the art and that when the pen was inspected the day before the accident, everything was secure. Noting that cattle would not ordinarily escape such an enclosure in the absence of negligence, we held that the plaintiff satisfied his burden with regard to the first element.

The *Roberts* defendant conceded that the second element was met, so we next examined whether the plaintiff presented evidence to satisfy the third element, the absence of an explanation by the defendant as to how the cattle escaped. Though the defendant claimed that he had such an explanation—that the cattle escaped after breaking the top hinge on the gate—we noted that the plaintiff presented evidence regarding the condition of the gate, the bottom hinge, and the chain securing the gate from which the jury reasonably could have concluded that the defendant's explanation was not credible.

Though the instant case is similar to *Roberts*, the court here determined that Gentrup's fencing and gates were not shown to be a state-of-the-art system as discussed in *Roberts*, and determined that Gentrup satisfied his burden of showing that there was no genuine issue of material fact because he established that cattle *could* escape through the gate in the absence of negligence. But the record does not unambiguously support the court's determination.

The record reflects that Gentrup stated that he had used the cattle pen since 1993 without any cattle escaping, that he did not notice his cattle behaving out of the ordinary when the cattle were placed in the pen, that he did not notice any animals in the vicinity which may have spooked the cattle, and that his inspection of the pen after the accident revealed that the pen's fences were intact, though the chain to the gate was unlatched and the gate was open. And the fence at issue here is a steel cattle fence with "sucker rods," which is secured to the ground with posts embedded in cement, similar to the fence in *Roberts*. Affidavits also indicated that Gentrup's cattle pen was standard in the industry. From those facts, a reasonable jury could determine that cattle do not escape enclosures such as Gentrup's in the absence of negligence. And though the record also reflects that Gentrup stated that he secured and latched the chain to the gate and placed the excess chain outside of the fence so that

the cattle could not lick or rub it, ultimately, the question is one properly decided by a jury.

On appeal, we review the evidence in the light most favorable to the party against whom summary judgment was granted, giving that party the benefit of all reasonable inferences deducible.[10] As the party moving for summary judgment, it was Gentrup's burden to establish that there was no genuine issue of material fact with regard to one or more of the elements of res ipsa loquitur. Because evidence exists from which a reasonable person could determine that it was more likely than not that the escape of Gentrup's cattle was an occurrence which would not, in the ordinary course of things, happen in the absence of negligence, the trial court's order granting summary judgment in Gentrup's favor was incorrect—unless § 25-21,274 changes the principles of common-law res ipsa loquitur upon which that conclusion depends.

§ 25-21,274

Gentrup argues that § 25-21,274 prevents the application of res ipsa loquitur in this case. Section 25-21,274 reads, in relevant part:

> In any civil action brought by the owner, operator, or occupant of a motor vehicle or by his or her personal representative or assignee or by the owner of the livestock for damages resulting from collision of a motor vehicle with any domestic animal or animals on a public highway, the following shall apply:
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> . . . .
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> . . . [t]he fact of escaped livestock is not, by itself, sufficient to raise an inference of negligence against the defendant[.]

Gentrup argues that § 25-21,274 effectively abolished the application of res ipsa loquitur to escaped livestock cases where there is no other evidence of negligence. But here, McLaughlin has other evidence which, in conjunction with the fact that livestock escaped, raises an inference of negligence. Section 25-21,274 states that "escaped livestock is not, *by*

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[10] See *Perez v. Stern, supra* note 1.

itself, sufficient to raise an inference of negligence." (Emphasis supplied.) As described above, there is more evidence here than simply the fact of escaped livestock: There is evidence of the construction of the pen, its successful use over a number of years, and Gentrup's inspection of the pen following the escape. And, as described above, that evidence, together with the fact of the escape, *would* support an inference of negligence.

Our interpretation is consistent with the legislative history of § 25-21,274. After our decision in *Roberts*, 2001 Neb. Laws, L.B. 781, was introduced and was intended to codify the state of our res ipsa loquitur law after the *Roberts* decision in order to resolve some apparent confusion in the Legislature and among members of the public about what *Roberts* had actually meant. So, at the beginning of the floor debate for L.B. 781, the chairman of the Judiciary Committee explained:

> Now I want to be clear for the record . . . the committee amendments which become the bill, are essentially a codification of existing case law as decided by the Nebraska Supreme Court, and that is the intent. The amendment does not prohibit the principle or the application of the doctrine of res ipsa loquitur . . . but this does provide a codification and clarification responsive to the concerns of any number of Nebraskans, particularly those in the livestock industry. The committee amendment strikes a balance on the subject. The amendment does not reverse the Supreme Court decision, I say again. The committee amendment will provide guidance for courts . . . on these negligence claims and will specify that the plaintiff is to prove the plaintiff's claim under ordinary negligence law. Additionally, the amendment clarifies that escaped livestock in and of itself is not a . . . sufficient fact to raise an inference against the defendant.[11]

Section 25-21,274 therefore does not displace the three elements of res ipsa loquitur as discussed in *Roberts* and does not prevent a res ipsa loquitur jury instruction in appropriate circumstances. Section 25-21,274 simply clarifies (consistent with

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[11] Floor Debate, 97th Leg., 1st Sess. 4957-58 (Apr. 18, 2001).

Roberts) that the fact of escaped livestock is, standing alone, insufficient to raise an inference of negligence against Gentrup. However, as discussed, because McLaughlin presented other evidence in conjunction with the fact of escaped livestock, § 25-21,274 does not bar McLaughlin's claim.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.