COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0627-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SECURA INSURANCE COMPANY, LA VERN FLANDERS AND ARLEAN FLANDERS,

PLAINTIFFS-RESPONDENTS,

V.

TODD MARK, BILLY JO MARK AND STOCKHOLM TOWN MUTUAL INSURANCE,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed and cause remanded with directions.*

HOOVER, J. This is an appeal of a small claims judgment holding Todd and Billy Jo Mark 80% negligent for damages that resulted when an automobile driven by Nathan Flanders[1] collided on a roadway with the Marks'

[1] Secura Insurance Company prosecuted this action by virtue of its subrogation rights for claims paid to and on behalf of it insureds, Flander's parents, as a result of this collision.

cow.[2] The trial court essentially applied a res ipsa loquitur analysis, holding that the Marks were negligent because their cow was on the roadway without having an explanation for how it came to be there. The Marks claim on appeal that the singular fact of the cow's presence on the road is insufficient proof that they were negligent. Rather, they contend, there has to be some evidence that the animal's owner failed to exercise ordinary care in a specific manner before liability can attach.[3] This court agrees and therefore reverses and remands for the entry of a judgment of dismissal.

The Marks own a herd of dairy cows. On October 8, 1994, an automobile driven by Flanders collided with one of a number of the Marks' cows that had escaped their enclosed pasture and were around the area of an adjoining road with one actually in the roadway. No evidence was submitted at trial as to how the cows got out of the pasture, and the court was unable to make a finding as to either how they got out or how long they had been off the Marks' property.[4] The evidence established that the electric fence line was sound and operating and that the gates were closed at the time of the collision. The Marks did not know the cows had gotten out of the pasture. There was no history of escapes or fence problems. There was evidence that the Marks' fence did not comply with the applicable statutory requirements and that cows are able to jump a height

[2] This is an expedited appeal under RULE 809.17, STATS.

[3] The trial court also apparently foreclosed the Marks from contesting damages at trial, binding the parties to their written "pretrial submission." The Marks claim that they should have been permitted to contest damages at trial. The record is not clear as to what the trial court's procedure was in this regard. In light of this court's remand for dismissal, however, the issue need not be addressed.

[4] "And I would have like to have had a little more information exactly how long those cows were on the road."

equivalent to that of the fence enclosing the pasture. The trial court did not, however, rely on this evidence in its oral decision. Rather, it found that the Marks' cows were on the road and the Marks did not know how they got there. From these two findings it concluded that the Marks were negligent for permitting their cows to be in the road without having a good explanation and for not knowing how they got there.

The essential facts, as set forth above, do not appear to be in dispute. An issue which involves the application of undisputed facts to established legal principles presents a question of law this court reviews without deference to the circuit court. ***Kania v. Airborne Freight Corp.***, 99 Wis.2d 746, 758-60, 300 N.W.2d 63, 68 (1981).

Secura argued and the trial court concluded that the Marks were negligent under a theory that suggested res ipsa loquitur; the cows' presence on the highway was sufficient to demonstrate that the owners were negligent in their attempt to enclose them: [5]

> The fact of the matter is the cows were on the road. They don't belong on the road. And when somebody comes along and runs into some cows I think it is fair to say the person who let the cows get in that position is negligent in my opinion unless there is a good explanation why the cows got there. … Cows were out on the road. You don't know how they got out there and it is your business to know how they got out there.

[5] The court's oral decision may also imply that one is negligent if the animals' whereabouts are unknown. This court does not hold that an animal owner is negligent as a matter of law if the owner is not aware at all times of the livestocks' whereabouts. Rather, the question is one of fact and is dependent in part on the length of time that the owner remains unaware.

The Marks argue that the court erroneously concluded that the cow's unexplained presence on the road was negligence or that it gives rise to strict liability. Negligence is the failure to exercise ordinary care under the circumstances. ***Marciniak v. Lundborg***, 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). The Marks' duty was not to keep their livestock enclosed, but to use ordinary care to that end. *See* ***Lembke v. Farmers Mut. Auto. Ins. Co.***, 243 Wis. 531, 535, 11 N.W.2d 169, 171 (1943). Wisconsin law rejects the notion "that all accidents or mishaps must arise as a consequence of fault." ***Millonig v. Bakken***, 112 Wis.2d 445, 452, 334 N.W.2d 80, 84 (1983).

The trial court did not point to any specific negligent act or omission.[6] Rather, and apparently applying the doctrine of res ipsa loquitur, it concluded that the Marks must have been negligent in some way because their animals were where they should not be. The doctrine of res ipsa loquitur applies where the accident would not ordinarily occur unless someone were negligent and was caused by an agency or instrumentality within the exclusive control of the defendant. ***Freitag v. City of Montello***, 36 Wis.2d 409, 415-16, 153 N.W.2d 505, 508 (1967). In this case, the first element is not present. The collision between Flanders' car and the Marks' cow could have occurred without the owners' negligence. This court agrees with the rule in ***Brauner v. Peterson***, 557 P.2d 359, 361 (Wash. App. Ct. 1976), where the court held that the presence of an animal loose on a highway was insufficient to warrant application of the res ipsa doctrine since the event must be one that ordinarily would not occur without someone's

[6] This court acknowledges the proposition that the cow could not be on the road absent negligence would have initial intuitive appeal to a trial judge required to reach a decision on the typically sparse record small claims practice invites, and lacking the relative luxury of reflection this court enjoys.

negligence and a cow could readily escape from an adequate enclosure. Because one of the two necessary elements for application of the res ipsa doctrine does not exist, this court concludes that the trial court erred by applying res ipsa to find the Marks negligent.

The trial court also seemed to hold that the Marks were negligent because they did not know at some unspecified time how the cows got on the road. This court is unaware of any authority for the proposition that an animal owner who, at or about the time of an auto-animal collision, fails to know how the livestock came to be on the roadway has, regardless of the surrounding circumstances, failed to exercise ordinary care. Such a theory appears to approach a strict liability standard in that it does not necessarily incorporate the element of reasonableness, that is, whether the owner's ignorance was reasonable under the circumstances. Wisconsin places strict liability on animal owners only under limited circumstances not present here.[7] Thus the trial court erred to the extent that it relied on the Marks' failure at an unspecified point in time to know how their cow got on the roadway in finding them negligent.

Upon the foregoing, the trial court is reversed and the cause is remanded for the entry of a judgment of dismissal.

By the Court.—Judgment reversed and cause remanded with directions.

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[7] *See* § 174.02, STATS., which imposes strict liability on dog owners for dog bites. ***Armstrong v. Milwaukee Mut. Ins. Co.***, 202 Wis.2d 258, 549 N.W.2d 723 (1996).

This opinion will not be published. RULE 809.23 (1)(b)4, STATS.