

SUPREME COURT No. 22-1337
CASS COUNTY CASE No. LACV025752

IN THE
SUPREME COURT OF IOWA

SIMRANJIT SINGH,
Plaintiff/Appellant

v.

MIKE MCDERMOTT,
Defendant-Appellee.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CASS COUNTY
HONORABLE CRAIG M. DREISMEIER,
DISTRICT COURT JUDGE*

**APPLICATION FOR FURTHER REVIEW
(Court of Appeals Decision Filed June 21, 2023)**

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CERTIFICATE OF FILING

I certify that I did file this application with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on July 11, 2023.



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QUESTIONS PRESENTED

After colliding with Mike McDermott's unattended cow on Interstate 80 at two o'clock in the morning, Simranjit Singh pursued a claim for negligence in the Iowa District Court for Cass County. In response to McDermott's summary judgment motion, Singh asserted that the doctrine of *res ipsa loquitur* allows a reasonable juror to conclude negligence based on the facts in the record. The district rejected Singh's attempt to apply *res ipsa loquitur* on the basis that he had not shown that the cow was under McDermott's exclusive control and management. Noting the split in authority, the court of appeals held that *res ipsa loquitur* can never apply because "because livestock's 'animate self-propulsion' is often sufficient to overcome perfectly adequate confines." *Singh v. McDermott*, No. 22-1337, 2023 Iowa App. LEXIS at *5 n.2 (Iowa Ct. App. June 21, 2023).

This further review application presents the following questions for review:

1. Does Iowa's error preservation rule allow the court of appeals to decide that the doctrine of *res ipsa loquitur* cannot apply when that issue was not raised or decided in the district court?
2. In an issue of first impression, does the doctrine of *res ipsa loquitur* allow a jury to infer negligence from the existence of an unattended cow on an adjacent highway?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

In a case of first impression, the Iowa Court of Appeals decided that a jury cannot employ, as a matter of law, the *res ipsa loquitur* doctrine to infer negligence from the presence of a roaming cow on an adjacent interstate highway. At least two aspects of the decision warrant further review. First, the court of appeals decided an issue that had not been preserved for appeal. The district court ruled that “no evidence” existed that “the injury was caused by an instrumentality under the exclusive control and management of the defendant.” (App. at 236). The district court never addressed the larger issue of whether *res ipsa loquitur* could ever apply to a stray-livestock case. Accordingly, the court of appeals’ decision conflicts with this Court’s precedent establishing that an issue “must ordinarily be both raised and decided by the district court before [Iowa courts] will decided them on appeal.” *Nahas v. Polk Cty.*, No. 22-0239, 2023 Iowa Sup. LEXIS 64 at *25 (Iowa June 9, 2023) (cataloguing cases).

Second, the court of appeals’ refusal to apply *res ipsa loquitur* is manifestly incorrect. The court’s holding is premised on its “view that a cow’s escape is not prima facie evidence of negligence because

livestock’s ‘animate self-propulsion’ is often sufficient to overcome perfectly adequate confines.” *Singh*, No. 22-1337, 2013 Iowa App. LEXIS 511 at *5 n.2. Yet, not a scintilla of evidence in the summary judgment record suggests the cow broke through Defendant’s gate. Just the opposite, the summary judgment record included pictures of Defendant’s exterior fence that showed it to be in normal working condition. (07/15/22 Pl’s MSJ App. at 8-48).

Furthermore, this Court’s endorsement of *res ipsa loquitur* as an evidentiary device is broad enough to encompass the facts of this case:

In Iowa, *res ipsa loquitur* applies in negligence cases when (1) the injury is caused by an instrumentality under the exclusive control of the defendant, and (2) the occurrence is such that in the ordinary course of things would not happen if reasonable care had been used.

Clinkscapes v. Nelson Sec., Inc., 697 N.W.2d 836, 847 (Iowa 2005).

Here, there is no dispute that “[*Defendant*] owned the cow.” (App. at 234) (emphasis added). It is equally undisputed that in the ordinary course of things in 2023, livestock do not stray onto adjacent interstate highways. For these reasons, the case for further review is clear.

STATEMENT OF THE CASE

Simranjit Singh filed a claim for negligence against Mike McDermott after Singh's semi-truck collided with McDermott's cow that was roaming along Interstate 80. McDermott filed a motion for summary judgment arguing there was "no genuine issue of material fact with respect to necessary elements of Plaintiff's negligence claim." (App. at 9). Invoking the *res ipsa loquitur* doctrine, Singh asserted that a jury question existed as to whether the cow's unattended presence on the adjacent interstate highway constituted negligence. (App. at 150-151).

In granting summary judgment, the court rejected Singh's invocation of *res ipsa loquitur*. Specifically, the court found "no evidence" that "the injury was caused by an instrumentality under the exclusive control and management of the defendant." (App. at 236). This appeal ensued.

STATEMENT OF FACTS

On January 26, 2019, Simranjit Singh was traveling eastbound in his semi-tractor trailer along Interstate 80 near mile-marker 69. (App. at 161). At approximately two o'clock in the morning, Singh's semi

struck a black cow that was standing in the right lane of the interstate. (App. at 234). The owner of the cow, Mike McDermott, owned the property next to the interstate where the cow had been confined prior to the collision. (App. at 234). McDermott's property was fenced and had gates for the purpose of confining his livestock. (App. at 234). As a result of the collision, Singh suffered personal injuries along with substantial property damage to his truck. (App. at 235).

ARGUMENT

I. THE COURT OF APPEALS DECISION BELOW CONFLICTS WITH LONG-ESTABLISHED CASE LAW FROM THIS COURT CONCERNING ERROR PRESERVATION OF ISSUES THAT WERE NOT DECIDED BY THE DISTRICT COURT

The court of appeals' central holding is that "the doctrine of res ipsa loquitur should not be applied because a cow may come to be on the roadway without any act of negligence necessarily bringing it there."

Singh, No. 22-1337, 2023 Iowa App. LEXIS 511 at *4. But, the district court never ruled that res ipsa loquitur was inapplicable to a stray-livestock case. Just the opposite – the district court implicitly ruled that it could apply, but found that Singh had not offered evidence that the cow was in McDermott's exclusive control:

The Court agrees that the facts as presented do not fit a res ipsa theory. *Due to the lack of evidence presented by the Plaintiff, there is no evidence to meet even the first element of res ipsa that “the injury was caused by an instrumentality under the exclusive control and management of the defendant.” Tamco Pork LLC v. Heartland Co-op*, 876 N.W.2d, 226, 232. Therefore, any liability asserted under res ipsa is also dismissed.

(App. at 236)(emphasis added). McDermott did not file a motion to enlarge the district court’s summary judgment ruling. *See Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005) (observing that a motion to enlarge under rule 1.904(2) is required to preserve error when the district court does not address an issue in its written decision).

Not surprisingly, Singh focused his appellate argument on the existence of a genuine issue of material fact as to McDermott’s control of the cow. This court uses a “flexible application of control.” *Verwers v. Rhoades*, No. 08-1149, 2009 Iowa App. LEXIS 365 at *6 (Iowa Ct. App. May 6, 2009). The “right or power to control” and the “opportunity to exercise” the right or power is sufficient to generate a jury question as to a defendant’s control. *Id.* (quoting *Wick v. Henderson*, 485 N.W.2d 645, 649-50 (Iowa 1992)). Here, McDermott had both. Indeed, it is

undisputed that McDermott was the “owner of the cattle.” (App. at 161).

Rather than confine its decision to the narrow issue presented, the court of appeals decided – as a matter of law – that *res ipsa loquitur* could never apply to a stray-livestock case. In this way, the court of appeals “entered a decision in conflict with a decision of this [C]ourt.” Iowa R. App. 6.1103(1)(b)(1). Indeed, just twelve days before the court of appeals’ decision, this Court reiterated its error preservation rules in the *Nahas* decision:

Finally, *Nahas* disputes section 670.4A’s constitutionality. We decline to consider this argument because error was not preserved for our review. The district court never ruled on the statute’s constitutionality. “It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”

Nahas, No. 22-0239, 2023 Iowa Sup. LEXIS 64 at *25. What was true in *Nahas* is also true here. Because the district court did not rule that *res ipsa loquitur* was inapplicable to stray-livestock cases writ large, that issue was not preserved for appellate review. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (“we hold that we will not consider a substantive or procedural issue for the first time on appeal, even

though such issue might be the *only* ground available to uphold a district court ruling”).

II. FURTHER REVIEW IS WARRANTED ON THE QUESTION OF FIRST IMPRESSION OF WHETHER RES IPSA LOQUITUR APPLIES TO A COW THAT WANDERS UNATTENDED ONTO AN ADJACENT INTERSTATE HIGHWAY

If error was properly preserved, this appeal presents “an important question of law that has not been, but should be, settled by the supreme court.” Iowa R. App. 6.1103(1)(b)(2); *see also Singh*, No. 22-1337, 2023 Iowa App. LEXIS at *5 n.2 (“Our appellate courts have discussed liability regarding a vehicle striking livestock on a roadway but have not previously addressed the application of *res ipsa loquitur* under those facts”). That is, may the jury employ the doctrine of *res ipsa loquitur* to infer negligence by the existence of stray livestock roaming on an adjacent interstate highway? The answer is an obvious “yes.”

Res ipsa loquitur is Latin for “the thing speaks for itself.” *Conner v. Menard, Inc.*, 705 N.W.2d 318, 320 (Iowa 2005). It is a type of circumstantial evidence which allows the jury to “infer the cause of the injury from the naked fact of injury, and then to superadd the further inference that this inferred cause proceeded from negligence.” *Id.*

(quotation omitted). It is a rule of evidence; not one of pleading or substantive law. *Wick*, 485 N.W.2d at 648. To submit a case on the theory of *res ipsa loquitur*, a plaintiff must introduce substantial evidence that: (1) the injury was caused by an instrumentality under the exclusive control and management of the defendant, and (2) that the occurrence causing the injury is of such a type that in the ordinary course of things would not have happened if reasonable care had been used. *Banks v. Beckwith*, 762 N.W.2d 149, 152 (Iowa 2009). “If there is substantial evidence to support both elements, the happening of the injury permits -- but does not compel -- an inference that the defendant was negligent.” *Id.* (quotation omitted).

A jury question exists on both elements. Viewed in the light most favorable to Singh, a reasonable factfinder could conclude that McDermott exercised exclusive control over the cow because he was its owner, and he owned the land on which the cow previously was confined. Likewise, in “the ordinary course of things, [livestock roaming long the highway does] not occur in the absence of negligence and cannot occur unless the party in exclusive control does something or fails to do something an ordinary person would do under the

circumstances.” *Clinkscapes*, 697 N.W.2d at 848. Otherwise, with over 3.8 million head of cattle in our state, Iowans would be facing an epidemic of stray-cattle vehicular crashes and corresponding litigation. See www.iabeef.org/raising-beef/cattle-industry-facts (last accessed July 11, 2023).

The court of appeals’ analysis is doubly flawed in this regard. First, the court confused *res ipsa loquitur* with negligence *per se*. This confusion is on full display in its pronouncement that “a cow’s escape is not prima facie evidence of negligence.” *Singh*, No. 22-1337, 2023 Iowa App. LEXIS at *5 n.2. That explains negligence *per se*. But, *Singh* has never argued that a cow’s escape is negligence *per se*.¹ Instead, *Singh* argues that a jury may – but is not required – infer from the

¹ Livestock running at large used to constitute negligence *per se* under Iowa’s “fencing-in” statute. That statute, however, was repealed in 1994. See *Klobnak v. Wildwood Hills, Inc.*, 688 N.W.2d 799, 800 (Iowa 2004). Nonetheless, animal owners still owe an ordinary a duty of care to travelers using abutting highways. *Id.* at 801-03 (citing *see e.g.* 61A C.J.S. *Motor Vehicles* §1926, at 192 (2002) (The ordinarily careful and prudent farmer puts his animal in a barn, and shuts and latches the doors or confines it in the yard with proper fencing and secured gates)); *see also Thompson v. Kaczinski*, 774 N.W.2d 829, 835-36 (Iowa 2009) (citing *Weber v. Madison*, 251 N.W.2d 523, 527 (Iowa 1977) (A landowner abutting a highway is under an obligation to use reasonable care to not to create hazards in the adjoining highway or injury the highway traveler)).

circumstances that the owner was negligent, which is *res ipsa loquitur*.
See Roberts v. Weber & Sons, Co., 533 N.W.2d 664, 669 (Neb. 1995)
 (“There are certain factual situations, as evidence by the case at bar,
 wherein livestock ordinarily would not escape onto a public highway in
 the absence of some negligence”); *Nuclear Corp. of Am. V. Lang*, 480
 F.2d 990, 993 (8th Cir. 1973) (observing that inference that “unattended
 animals do not usually escape their enclosures unless someone was
 negligence [is] a conclusion which is supported by an abundance of
 authority”)(citing cases); *Shepard v. Smith*, 263 P.2d 985, 988 (Idaho
 1953) (holding that *res ipsa loquitur* “should be applied at least to the
 extent of requiring the owner of animals unattended upon a heavily
 traveled highway . . . to satisfactorily explain their presence in order to
 avoid an otherwise justifiable inference of negligence”).

The court of appeals’ reasoning for declining to apply *res ipsa loquitur* is especially dubious. It flows from the belief that “livestock’s animate self-propulsion is often sufficient to overcome perfectly adequate confines.”² *Singh*, No. 22-1337, 2023 Iowa App. LEXIS at *5

² This finding was never tested through the normal adversarial process because it was not raised in the district court. Nor did the

n.2. Tellingly, the court does not cite to any evidence in the summary judgment record to support its finding. And for good reason – there is no evidence that the cow burst through McDermott’s fence. Just the opposite – Singh introduced into the summary judgment record pictures of McDermott’s fence and gate showing them to be in good working order. (07/15/22 Pl’s MSJ App. at 8-48). Instead, the court of appeals cites to the 1961 decision from the California Court of Appeals in *Pepper v. Bishop*, 194 Cal. App. 2d 731 (Cal. Ct. App. 1961). *See Singh*, No. 22-1337, 2023 Iowa App. LEXIS at *5 n.2. In *Pepper*, however, the question before court was whether California’s statute barring application of *res ipsa loquitur* to collisions with livestock was constitutionally permissible. *Pepper*, 194 Cal. App. 2d at 732-34. Iowa has no such statutory analogue. Additionally, *Pepper* involved *horses* and evidence establishing “that the horses had caused the breaks” in the landowner’s gate. *Id.* at 733.

Singh’s case presents an animal of an entirely different stripe. Here, there is no evidence that the cow jumped over the fence. Nor is there any evidence that the cow broke through a secured barrier.

district court consider it in its summary judgment analysis. Instead, the court of appeals essentially took judicial notice of it *sua sponte*.

Consequently, any analogy to the *Pepper* decision is wholly misplaced. In all these respects, *Pepper* offers no guidance. It certainly is not sufficient to establish a bright-line rule that *res ipsa loquitur* may never apply to a roaming livestock case.

CONCLUSION

For the reasons articulated herein, Simranjit Singh asks this Court to grant further review, vacate the court of appeals' decision, and remand back to district court for trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the cost of printing this application is \$6.75.

CERTIFICATE OF COMPLIANCE

This application complies with the type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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