IN THE SUPREME COURT OF IOWA
NO. 22-1337

SIMRANJIT SINGH,

Plaintiff-Appellant,

vs.

MIKE MCDERMOTT,

Defendant-Appellee.

APPEAL FROM THE CASS COUNTY DISTRICT COURT
THE HONORABLE CRAIG M. DREISMEIER

Case No. LACV025752

APPELLEE'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION FILED JUNE 21, 2023

Michael T. Gibbons, AT0002906
Christopher D. Jerram, AT0014068
Raymond E. Walden, pro hac vice
WOODKE & GIBBONS, P.C., L.L.O.
619 N. 90th Street
Omaha, Nebraska 68114
Telephone: (402) 391-6000
Facsimile: (402) 391-6200
Email Address: mgibbons@woglaw.com
cjerram@woglaw.com
rwalden@woglaw.com
ATTORNEYS FOR APPELLEE/DEFENDANT

STATEMENT RE QUESTIONS PRESENTED FOR REVIEW

The primary issue presented by any application for further review is whether the Supreme Court should exercise its discretion to grant or deny further review, to review only those issues brought to the Court's attention by the application for further review, or to review any or all of the issues raised in the original appeal. Iowa R. App. Pro. 6.1103(1)(d).

Appellant's application raises only two issues. Not raised is whether the Court of Appeals correctly ruled that the district court committed no legal error in granting summary judgment on the ground that Mr. Singh had set forth "no specific facts to generate a dispute on" on whether "the owner failed to act with ordinary care in harboring the animal." Opinion, pp. 3-4.

The two issues that Mr. Singh does present in his application contradict one another, and each is based on an inaccurate premise. His first issue asks: "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?" As discussed below, Mr. Singh expressly raised that issue before the district court and the district court specifically addressed the issue and found there to be no evidence to support application of the doctrine.

The second issue Mr. Singh cites is, "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?" Appellee Mr. McDermott disputes that this is a matter of first impression for judicial determination when the question is read more broadly as involving any domestic animals. As discussed below, the Iowa Legislature decided to repeal a long-standing statute that effectively imposed the kind of strict liability that might result from application of res ipsa, and that repeal reinstated common law doctrine that requires evidence of negligence causing domestic animals of any kind to escape confinement. The Court of Appeals properly adhered to that statutory repeal by declining to reinstate the statutory rule through the guise of res ipsa loquitur.

Further review is not warranted on either issue.

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STATEMENT OPPOSING FURTHER REVIEW

I.

THE RES IPSA LOQUITUR ISSUE WAS RAISED AND ADDRESSED IN THE DISTRICT COURT AND PROPERLY CONSIDERED BY THE COURT OF APPEALS.

Mr. Singh's reasoning on his error-preservation point is confusing and flatly wrong as to its premise. It is not true that the *res ipsa loquitur* issue was not raised or decided in the district court. The District Court described the threshold issue: "Defendant's motion asserts that due to the lack of evidence, Plaintiff cannot meet the elements for breach of duty of care, and that any finding of breach would just be speculation. Plaintiff argues that the fact that the cow was in the road is the proof that the duty of care was breached." (App. 235) Then the district court noted that in resistance to Defendant's summary judgment motion, Plaintiff tried to recharacterize his claims as based on *res ipsa loquitur*. (App. 236) Then, after ruling that the negligence claim was unsupported by evidence, the district court continued:

> [T]he 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. 236)

In his Brief of Appellant, Mr. Singh acknowledged that "on Singh's res ipsa loquitor the [district] court concluded that there is no evidence in the record that the cow was under the exclusive control and management of McDermott who was the undisputed owner of the cow." Brief of Appellant, p. 8. The Court of Appeals noted that in oral argument "Singh's counsel stressed his reliance on res ipsa loquitur as preventing summary judgment." Opinion, p. 5 n.2.

Therefore, the res ipsa loquitur doctrine and its applicability to the facts presented in the summary judgment record clearly was raised by Mr. Singh and decided by the district court, then raised again by Singh in the appeal and decided by the Court of Appeals. It is confusing how Singh can now say the Court of Appeals erred in addressing the *res ipsa loquitur* issue. Singh's counsel stood before the appellate panel and argued that he was relying on *res ipsa*, in a tacit concession that he had entirely failed to develop any evidence of negligence. The questions and answers during oral argument drew on McDermott's extensive examples in briefing of cases in which courts declined to find that liability should be imposed under *res ipsa loquitur* principles where cows and other domestic animals were on public roads. Singh argued that if a cow is on the road, its presence there is legally

the fault of its owner under a *res ipsa* theory in every instance, so there is no need to develop evidence of what the owner might have done wrong to allow the cow to be there. Singh made a categorical argument but now argues that the Court of Appeals erred not just by rejecting his position but by even considering the issue.

Singh tries to paint the *res ipsa loquitur* as two separate issues, one being whether *res ipsa* can ever apply to a cow on a road and the other whether the evidence established the elements of *res ipsa* in the present case, with the former "inapplicable to stray-livestock cases writ large" aspect not being properly on appeal. However, that is not the way the *res ipsa* issue was treated in the district court or in the appellate briefing, nor the way it was treated during oral argument, nor in the way the Court of Appeals expressed the reasons for its opinion.

The Court of Appeals had before it the district court decision saying that Singh was "incorrectly relying on the cow's presence on the road as enough" and that the "facts as presented do not fit a res ipsa theory" because "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.'" (App. 235-36) It also had the Appellee's brief, which cited and described many cases around the country applying

common law rules to cow and other domestic animal cases—because Iowa had not developed such a body of law during the time of the "fencing in" statute, then restored the common law principles by repealing the statute.

Many of those cases dealt with the need to prove negligence rather than just rely on the presence of an animal in the road to establish negligence. *See, e.g.*, *Ladnier v. Hester*, 98 So. 3d 1025 (Miss. 2012) (it would not be impossible for a cow to escape and get onto a nearby road, even though its owner was not negligent in any manner in his confinement of the cow, and therefore, allowing the jury to infer negligence, simply because defendant's animal was loose on the road, is not appropriate); *Jackson v. Lankford*, 1998 OK CIV APP 174, 970 P.2d 622 (bull owner not liable for collision on highway under negligence standard where motorist failed to show that owner negligently maintained fence over which bull jumped); *Reed v. Molna*, 67 Ohio St. 2d 76, 423 N.E.2d 140 (1981) (noting judicial recognition that cattle and other domestic animals can escape from perfectly adequate confines).

Many other cited cases dealt with failure to satisfy the requirements under the *res ipsa loquitur* label. The two elements of *res ipsa* are established in Iowa law:

> "(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."

Tamco Pork II, LLC v. Heartland Co-op, 876 N.W.2d 226, 232 (Iowa App. 2015) (quoting *Banks v. Beckwith*, 762 N.W.2d 149, 152 (Iowa 2009). Appellee cited many *res ipsa* cases holding that those elements were not satisfied in circumstances involving cattle or other domestic animals. *See, e.g., Watzig v. Tobin*, 292 Or. 645, 642 P.2d 651 (1982) (*res ipsa* does not apply in every case in which a cow escapes from an enclosure onto a road, but may apply if evidence shows because of the nature of the particular enclosure the only way for the cow to escape would be through owner's negligence); *Martinez v Teague*, 96 N.M. 446, 631 P.2d 1314 (Ct. App. 1981); *Reed v. Molna*, 67 Ohio St. 2d 76, 423 N.E.2d 140 (1981) (trial court properly declined to instruction on *res ipsa* because it could not be said that the presence of unattended cattle on the public highway is an occurrence that would not have materialized absent someone's negligence); *Brauner v. Peterson*, 16 Wash. App. 531, 557 P.2d 359 (1976) (presence of a cow at large on the highway is not sufficient to warrant application of *res ispa*, since the event must be of a kind not ordinarily occurring in the absence of someone's negligence and, as the court emphasized, a cow can readily escape from perfectly adequate confines); *Akin v. Berkshire*, 85 N.M. 425,

512 P.2d 1261 (Ct. App. 1973) (auto owner who struck cow in road failed to sustain his burden of proof on the first element of the *res ipsa loquitur* doctrine—that the accident be of the kind that ordinarily does not occur in the absence of someone's negligence—because the only evidence was that the cow was on highway, but cows might get out of a fenced pasture if chased by men or animals and cows have been known to jump fences).

These cases included recognition that a means for a cow to be on a road may be through the act or omission of a third person not attributable to the owner. *See, e.g.*, *Barnes v. Frank*, 28 Colo. App. 389, 472 P.2d 745 (1970) (doctrine of *res ipsa loquitur* did not apply in a case where a motorist struck a cow that was loose on the highway, because for the doctrine to be applicable it must appear that the accident is of a kind that ordinarily does not occur in the absence of defendant's negligence, but this requirement was not satisfied as cattle may have entered highway for any number of factors, including acts of third persons).

Oral argument included discussion of the various ways that a cow could come to be on a public road without the means necessarily being the negligence of the owner. One means mentioned was that an owner may lend cattle to another landowner to graze, so that the cow is for that time under the control of a third person. Along those lines, defense counsel pointed out

evidence that Mr. Singh saw the cow come from the direction across the road from McDermott's property. Also discussed was the potential that a third person coming onto the owner's land might leave a previously closed gate open. Or there is the potential that an intact fence meeting the standard of care for enclosing cattle, and with properly closed gates, could be leaped over by a cow, as the New Mexico Supreme Court said in *Akin*.

Singh inaccurately characterizes the Court of Appeals' opinion as holding "that *res ipsa loquitur* could never apply to a stray-livestock case." Application, p. 11. Instead, the Court of Appeals merely worked through the elements of *res ipsa* to "find the doctrine of res ipsa loquitur should not be applied because a cow may come to be on a roadway without any act of negligence necessarily bringing it there." Opinion, p. 4. Part of that analysis was to note that there is some disagreement among courts in other states "as to whether and to what extent the doctrine of res ipsa loquitur applies," and to hold that "a cow's escape is not prima facie evidence of negligence." Opinion p. 5, n.2.

In reaching this conclusion about *res ipsa* in a livestock case, the Court of Appeals simply declined to reinstate under a *res ipsa* label what the Legislature had done away with in 1994. That was when the Legislature repealed a statute stating, "All animals shall be restrained by the owners

thereof from running at large." *See* 1994 Iowa Acts ch. 1173, § 42(1) (repealing Iowa Code ch. 169B). When the "fencing in" statute was in effect, the Supreme Court read it to mean that an animal running at large on the road "constituted mere prima facie negligence, defendant having the right to show, if he could, that he exercised reasonable care in restraining the animal." *Wenndt v. Latare*, 200 N.W.2d 862, 866 (Iowa 1972). After repeal, the Supreme Court said the effect was to do away with the prima facie negligence effect of an animal running at large and leave only the preexisting common law duties. *Klobnak v. Wildwood Hills, Inc.*, 688 N.W.2d 799 (Iowa 2004). It was the statute that had relieved a plaintiff's burden under the common law to present evidence of negligence and had shifted to the defendant the burden of showing that the animal's escape was not the result of the defendant's negligence. The statute has been gone for nearly 30 years and the Supreme Court has declared that common law principles have rebounded in this particular area of the law. The Court of Appeals has not in any way overstepped its authority by declining to restore the repealed statutory scheme and calling it *res ispa loquitur*.

Singh drops into its argument about the failure to preserve error that McDermott did not file a motion to enlarge the district court's summary judgment ruling, and cites a case citing Iowa R. Civ. Pro. 1.904(2). He does

not explain why the party winning summary judgment needed to ask the district court to enlarge its explanation of why the evidence fails to support the elements for the *res ipsa loquitur* doctrine. Perhaps McDermott was supposed to anticipate that deep into the appeal Singh would shift to the notion that "res ipsa loquitur writ large" is different from testing the evidence for support or lack of support of the *res ipsa loquitur* elements in the particular case. That makes no sense when the district court entirely agreed with the moving party's position that the evidence did not support the *res ipsa* elements and gave him complete relief. The case Singh cites on this point did not involve a summary judgment winner failing to preserve an issue for appeal, but instead involved the summary judgment loser having failed to ask the district court to enlarge its declaratory judgment to spell out how it ruled on an issue that the plaintiff presented to the court but that the judge did not specifically address in the judgment. In *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2005), the Court described the rule in terms showing it has no applicability to the present case posture: "Generally, error is not preserved for appeal on an issue submitted but not decided by the district court when the party seeking the appeal failed to file a posttrial motion asking the district court to rule on the issue." Here the appellant is Singh, not McDermott. McDermott

received all the relief he requested and did not fail to preserve anything necessary to his ability to argue on appeal that the district court reached a correct decision.

II.

THE COURT OF APPEALS APPLIED LONG-ESTABLISHED LEGAL ELEMENTS TO UNCONTROVERTED LACK OF EVIDENCE FOR THOSE ELEMENTS IN REACHING ITS DECISION, SO FURTHER REVIEW IS NOT WARRANTED.

Singh argues that the Court of Appeals improperly treated the *res ipsa* doctrine as raising a prima facie case of negligence when the *res ipsa* elements are shown by evidence. Actually, that is exactly what *res ipsa* does when it applies. "The doctrine of res ipsa loquitur provides, 'in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence that establishes a prima facie case.' Res Ipsa *Loquitur*, *Black's Law Dictionary* (11th ed. 2019)." *Newell v. State*, 974 N.W.2d 532, n.2 (table) (Iowa App. 2022). The Iowa Supreme Court has long equated the effect of applying *res ipsa* with the plaintiff establishing a prima facie case of negligence. *See, e.g., Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 831 (Iowa 2000) ("Provided there is substantial evidence to support both elements, the happening of the injury permits—but does not compel—the jury to draw an inference that the defendant was negligent."); *Tappe v. Iowa Methodist Medical Center*, 477 N.W.2d 396, 399 (Iowa 1991)

(describing appeal as a challenge to district court's refusal to let plaintiff "establish his prima facie case of negligence . . . through reliance on the doctrine of res ipsa loquitur"); *Wiles v. Myerly*, 210 N.W.2d 619, 628 (Iowa 1973) (stating that when *res ipsa* raises an inference of negligence, the defense has to present strong enough evidence to "sufficiently overcome a prima facie case").

When the "fencing in" statute was in force, the Supreme Court said that when the statute did not apply by its terms to a particular situation, the effect was that the mere presence of the animal on the roadway "will not constitute prima facie evidence of negligence," and the plaintiff would have to prove negligence under common law principles. *Weber v. Madison*, 251 N.W.2d 523, 528-29 (Iowa 1977) (involving geese, which did not fit the statute). When the statute was in effect and applied in a particular case, the Supreme Court held that the animal being at large on the highway was prima facie evidence of the defendant's negligence. *Ritchie v. Schaefer*, 254 Iowa 1107, 1113–14, 120 N.W.2d 444, 447–48 (1963); *Hansen v. Kemmish*, 201 Iowa 1008, 1015, 208 N.W. 277, 280 (1926); *Stewart v. Wild*, 196 Iowa 678, 685, 195 N.W. 266, 268–69 (1923); *Strait v. Bartholomew*, 195 Iowa 377, 379–80, 191 N.W. 811, 812 (1923). After repeal of the statute in 1994, the Supreme Court said the statute had "added a new dimension in animal-

owner liability: prima facie evidence of negligence." *Klobnak v. Wildwood Hills, Inc*., 688 N.W.2d 799, 801 (Iowa 2004). But with the statute gone, the law on animals on the roadway reverted to the common law and its duty to exercise ordinary care. *Id*. at 800.

Klobnak was an appeal from a grant of a livestock owner's motion to dismiss. The Supreme Court said that the motorist who struck the livestock had alleged the owner's negligence by "failing to test and identify the conditions of its fences and failing to take the necessary precautions to make the confinement safe." *Id*. 688 N.W.2d at 800.

As both lower courts recognized, and the Appellant concedes by focusing on *res ipsa*, at the summary judgment stage Singh failed to present any evidence of negligence on McDermott's part. Instead, he argued that *res ipsa loquitur* is supported by evidence that McDermott owned the cow and that McDermott owned land next to the highway where Singh ran into the cow. McDermott presented photographic evidence of the fence around the property, indicating there were no gaps or broken fencing. There is no evidence criticizing the adequacy of the fencing. There is no evidence about how the cow came to be on the road. There is not even evidence that McDermott kept the cow on that property and inside the fence before it came to be on the road. As mentioned above, the cow approached the road from

the opposite side, not from the side with McDermott's property. Among the many possibilities discussed in oral argument was the practice of other landowners taking control of cattle for grazing land other than the livestock owner's own property. Singh entirely failed to develop any evidence about how the cow got out, let alone about any failure of duty on McDermott's part. McDermott was never deposed.

Given this void in the evidence, the only way to find an inference of negligence under a *res ipsa* theory would be to judicially reinstate the repealed statute. That the Court of Appeals was correct in refusing to do so through a rewrite of the *res ipsa* elements is so obvious that the Supreme Court should not expend its resources to merely announce the same result.

CONCLUSION

The Supreme Court should deny the Application for Further Review.

Respectfully submitted this 14th day of August 2023.

MIKE McDERMOTT,
Defendant/Appellee

By: */s/Raymond E. Walden*

Michael T. Gibbons, #AT0002906
Christopher D. Jerram, #AT0014068
Raymond E. Walden, pro hac vice
Woodke & Gibbons, PC, LLO
619 N. 90th Street
Omaha NE 68114
Phone: (402) 391-6000
Fax: (402) 391-6200

mgibbons@woglaw.com
cjerram@woglaw.com
rwalden@woglaw.com
Attorneys for Defendant/Appellee

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This brief complies with the type-volume limitation of *Iowa R. App. P*. 6.1103(4) because the brief contains approximately 3212 words, excluding the parts of the brief exempted by *Iowa R. App. P.* 6.1103(4).

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gary@iowajustice.com

matthew@iowajustice.com

/s/Raymond E. Walden