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

FINAL BRIEF OF APPELLEE

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    a. Iowa Code § 169B.2 (repealed 1994)

    b. 1994 Iowa Acts ch. 1173, § 42(1) (repealing Iowa Code ch. 169B)

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2. Did the District Court correctly rule that the *res ipsa loquitur* doctrine does not apply?

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    j. *Watzig v. Tobin*, 292 Or. 645, 642 P.2d 651 (1982)

    k. *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950)

ROUTING STATEMENT

The Appellee/Defendant believes review by the Court of Appeals would be appropriate. All of the core issues about common law negligence requirement concerning animals have been settled by the Iowa Supreme Court, and the Court of Appeals is fully capable of applying those principles to the current facts. Therefore, this appeal fits the criteria for transfer to the Court of Appeals. *See* Iowa R. App. Pro. 6.1101(3)(a).

STATEMENT OF THE CASE

A. Nature of the Case

Indiana resident Simranjit Singh sued Mike McDermott, a resident of Cass County, Iowa, claiming both personal injury and property damage as a result of a collision between a truck Singh was driving on Interstate 80 in and a cow alleged to have been owned by McDermott. (App. 6–7 ¶¶ 1-3, 7-12, 16) Singh alleged that negligence by McDermott caused the cow to be in the road. (App. 7 ¶¶ 13-15) The Petition contains no allegations going to *res ipsa loquitur*. (App. 6-8)

B. Issues Presented to 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)

In resistance, Plaintiff tried to recharacterize his claims as based on *res ipsa loquitur*. (App. 236)

Defendant's Motion also presented an issue about the Plaintiff's lack of evidence to support the element of causation for his injuries and his alleged future damages because of his failure to comply with requirements for identifying medical experts. (App. 18-19)

A third issue presented was about Plaintiff's lack of evidence to support his claim concerning the value of property damage. (App. 20)

C. Disposition of the Case in the District Court

District Judge Craig Dreismeier pointed out that after an "extensive amount of time for discovery," Mr. Singh presented no evidence about Mr. McDermott's alleged negligence other than his cow being in the road. (App. 235) He noted that both sides cited *Klobnak v. Wildwood Hills, Inc*., 688 N.W.2d 799 (Iowa 2004) (involving horses struck by a car on a road), and wrote:

> The Court finds that the holding in Klobnack, in light of the legislature's removal of the "fencing in" statute, points to the requirement that the Plaintiff needs to provide at least the minimum amount of evidence that the duty of care was breached besides the presence of a cow in the road.

> In Klobnack v. Wildwood Hills, Inc., 688 N.W.2d 799, 800 (Iowa 2004), the Iowa Supreme Court acknowledged the absence of statutory or common-law duty to restrain livestock, (specifically horses) but that, nevertheless, the Defendant still owed a duty of ordinary care. The Court went on to state that "[o]rdinary care by the defendant of his horse would be such care as an ordinarily prudent and careful farmer exercises under like circumstances. If the ordinary, careful, and prudent farmer puts his horse in a barn, and shuts and latches the doors thereto, or puts it in the yard, properly fenced, and properly closes and secures the gates, then that would be ordinary care." Klobnack, *supra,* at 801.
>
> The Plaintiff has presented no evidence of the Defendant's actions where a fact-finder could reasonably compare to those of an ordinary, careful, and prudent farmer while incorrectly relying on the cow's presence on the road as enough. Any findings a fact-finder would need to make as to why the cow ended up in the road would just be speculation: was the fence inadequate? was a gate unlatched? or, as it was suggested at the hearing, did the cow leap over the fence? While the Defendant did provide pictures of the fencing on his property, the Defendant nor any other expert was deposed to testify as to the adequacy of that fencing for that animal. Without the Plaintiff providing any evidence to generate a genuine question of material fact, the elements for negligence cannot be met and the claim must fail.

(App. 235-36)

The District Court noted Plaintiff's argument that his claim was based on *res ipsa loquitur*, but ruled that a *res ipsa* claim was not properly pled. (App. 236) The judge went on to say:

> 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. 236)

The District Court granted Defendant's Motion for Summary Judgment and dismissed Singh's claims. Because the liability issue was dispositive, the judge declined to address the other issues of damages asserted in the motion. (App. 236)

Plaintiff then filed his Notice of Appeal.

STATEMENT OF THE FACTS

1. After midnight on January 26, 2019, Simranjit Singh was driving a semi tractor-trailer on I-80 through Cass County, Iowa. (App. 242 (16:18-19), 245 (28:15-18), 251 (51:10-12), 254 (63:16-18))
2. He suddenly observed a black cow in the passing lane moving toward his position in the right lane, but he was unable to stop in time to avoid hitting it. (App. 251 (50:16-17, 52:10, 52:17-20, 52:24-25))
3. The front driver's side of the semi struck the cow and killed it. (App. 252 (53:16-18))
4. Singh testified that he does not know how the cow came to be on the road, or how long it had been there. (App. 255 (68:17-23))

Plaintiff admitted each of these facts in his response to the Defendant's Statement of Facts. His response also made statements of what he called undisputed facts:

1. The cow was owned by Defendant, which Defendant does not dispute for purposes of the summary judgment and appeal.
2. Defendant's property is located next to Interstate 80, which Defendant does not dispute for purposes of the summary judgment and appeal.
3. "Defendant has a fence and gates on his property for the purpose of confining his cow and not permitting it to stray on the highway."

(App. 155) Citation is to 40 pages of photographs produced with Defendant's Initial Disclosures. (App. 166-206) The photographs show fencing and gates with no signs on gaps or defects. Plaintiff offered no evidence that the fencing or gates violated any standard of care for owners of cattle.

Nothing in either the evidence presented to the District Court nor in the Brief of Appellant even states that there was any defect or gap in the fencing or gates or that anything about the fencing or gates violated a standard of care.

Singh's Statement of Facts on appeal repeat and add nothing to his

facts stated to the District Court, and state only that (1) his truck struck a cow on I-80, (2) McDermott owned the cow and also owned land next to the interstate where the collision occurred, and (3) the land was fenced and had gates for the purpose of confining McDermott's cow. Brief of Appellant p. 9.

ARGUMENT

Standard Of Review

The Iowa Supreme Court recently described the standards for review of an order granting a motion for summary judgment:

> We . . . review rulings granting summary judgment for correction of errors at law. [*EMC Ins. Grp. v. Shepard*, 960 N.W.2d 661, 668 (Iowa 2021)]. "On motion for summary judgment, the court must: (1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record." *Morris v. Legends Fieldhouse Bar & Grill, LLC*, 958 N.W.2d 817, 821 (Iowa 2021) (quoting *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)). "Summary judgment is proper when the moving party has shown 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *EMC Ins. Grp.*, 960 N.W.2d at 668 (quoting *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 882 (Iowa 2020)); *see also* Iowa R. Civ. P. 1.981(3).

Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 76 (2022).

The moving party may establish that there is not a genuine issue of material fact through answers to interrogatories, affidavits, admissions on

file, depositions, and pleadings. Iowa R. Civ. P. 1.981(3). Speculation and mere allegations are not material facts. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95–96 (Iowa 2005). Courts may only consider facts that are admissible as evidence when deciding a motion for summary judgment. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012) (quoting Iowa R. Civ. P. 1.981(5)).

There is a genuine issue for trial when reasonable minds could differ on an issue's resolution, but summary judgment is appropriate when the only issue is the legal consequences that result from undisputed facts. *Uhl v. City of Sioux City*, 490 N.W.2d 69, 74 (Iowa Ct. App. 1992) (citing *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988); *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986)).

Once the party requesting summary judgment has met its burden, the party opposing summary judgment "may not rest upon the mere allegations or denials in the pleadings," and "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 1.981(5). *See also Cemen Tech, Inc. v. Three D Indus., LLC*, 753 N.W.2d 1, 5 (Iowa 2008); *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005).

The Court will review the record in a light that most favors the nonmoving party and consider all legitimate inferences from the record on

that party's behalf. *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005) (quoting *Estate of Harris*, 679 N.W.2d [673,] 677 [(Iowa 2004)]). An inference is legitimate if it is reasonable, rational, and the substantive law allows it, but not if it is based on conjecture or speculation. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)).

"Summary judgment 'is not a dress rehearsal or practice run' for trial but rather 'the put up or shut up moment in a lawsuit, when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.'" *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 88 (2022) (quoting *Buboltz v. Birusingh*, 962 N.W.2d 747, 754-55 (Iowa 2021)). Summary judgment is proper when the plaintiff's claim lacks evidence to support a jury question on an essential element of the claim. *Huck v. Wyeth, Inc*., 850 N.W.2d 353, 362 (Iowa 2014); *Ranes v. Adams Labs., Inc.*, 778 N.W.2d 677, 685 (Iowa 2010); *Bradshaw v. Cedar Rapids Airport Comm*., 903 N.W.2d 355, 360 (Iowa App. 2017); Iowa R. Civ. P. 1.981(3).

I.

LIKE ANY OTHER NEGLIGENCE CASE, A CLAIM ABOUT A COW IN A ROAD REQUIRES EVIDENCE OF ITS OWNER'S NEGLIGENCE CAUSING IT TO BE THERE, SO PLAINTIFF'S RELIANCE ON ITS PRESENCE, WITHOUT MORE, IS INSUFFICIENT.

For most of the Twentieth Century, Plaintiff's lack of evidence at the summary judgment stage with respect to how a cow came to be walking across a road would have been fine. But that was then. Before 1994, there was a statute stating, "All animals shall be restrained by the owners thereof from running at large." When an adjacent landowner sought damages because of conduct by a neighbor's bull that had found its way to the wrong side of a partition fence in *Wenndt v. Latare*, 200 N.W.2d 862, 866 (Iowa 1972), the statute was then numbered as Iowa Code § 188.2, and the Court explained that the mere presence of an animal outside its owner's property on other land or on a public road can be prima facie evidence of negligence in the animal's confinement, but is not negligence as a matter of law. Citing cases involving an animal struck by a car on a highway—some involving cattle—and invoking the duty set out in the statute, the Court said that the statutory duty to restrain animals meant that the 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." *Id.*

Later the restraint statute was relocated to Iowa Code § 169B.2, but in 1994 this statute was repealed. *See* 1994 Iowa Acts ch. 1173, § 42(1) (repealing Iowa Code ch. 169B). In the current century, the Supreme Court explained the effect of the repeal of the statutory restraint duty while noting that nothing but the preexisting common law duties remained. *Klobnak v. Wildwood Hills, Inc*., 688 N.W.2d 799 (Iowa 2004) (involving horses struck by a car on a road).

Mr. McDermott pointed out all of this in briefing to the District Court, who agreed that summary judgment was required in the absence of any evidence to show breach of duty by an animal owner. Yet on appeal Mr. Singh is standing by his position that it is enough to show merely that McDermott owned the cow and nearby property and the cow was in the road. His position ignores that duty and breach of duty are separate elements of a negligence case. He accurately points out that "McDermott had a duty of care to keep his cow off the highway because it was a dangerous obstruction to highway traffic." Brief of Appellant p. 12. However, he simply jumps from there to conclude that "prima facie evidence of negligence exists in the summary judgment record that McDermott breached his duty of care by permitting his cow to be left

unattended on Interstate 80." Brief of Appellant p. 13. Such a leap requires at least some evidence to serve as a stepping stone betwixt duty and breach of duty.

Singh cites *Klobnak v. Wildwood Hills, Inc*., 688 N.W.2d 799 (Iowa 2004), which post-dates the repeal of the animal-restraint statute and involved a similar situation of a horse being struck by a car on a road. However, *Klobnak* was an appeal from an order granting a motion to dismiss, so it has limits on its relevance in a summary judgment case. The Supreme Court set the stage by pointing out that it could "consider only the facts as set out in the petition," and do so in the light most favorable to the plaintiff. *Id*. at 799. In a summary judgment proceeding, of course, that light shines on actual evidence purporting to support an essential element of a negligence claim, but there has to be evidence there to reflect the light. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 88 (2022). In the absence of evidence on an essential element of the claim, the claim lacks support and summary judgment is proper. *Huck v. Wyeth, Inc*., 850 N.W.2d 353, 362 (2014).

In *Klobnak*, the Supreme Court described the relevant part of the petition that required overruling of the motion to dismiss as to the breach element: "The plaintiffs alleged Wildwood was negligent in two respects:

failing to test and identify the conditions of its fences and failing to take the necessary precautions to make the confinement safe." 688 N.W.2d at 800. In that context, the horse's owner argued that repeal of the animal-restraint statute allowed all animal owners to let them roam freely with no duty to fence or otherwise restrain them. The Supreme Court, however, found a duty in the basic principles of common law negligence:

> It is true the defendants had no statutory duty to restrain their horses because our "fencing in" statute has been repealed. *See* 1994 Iowa Acts ch. 1173, § 42(1) (repealing Iowa Code ch. 169B). It is also true that no specific duty to restrain livestock exists at common law. *See Wagner v. Bissell*, 3 Iowa (Clarke) 396 (1856). Wildwood argues that, absent a statute imposing liability, owners may permit their horses to roam at large, free from any liability. It appears to us, however, that the specter of livestock running at large in our motorized society brings into question the rationality of such a rule. Our cases have established that animal-owner liability is not solely based on statute; there have been two potential bases for liability: the "fencing in" statute and a breach of ordinary care. As our cases have made clear, extinguishment of the statutory duty does not affect the duty to exercise ordinary care.

Id. The Court looked to a case, *Flesch v. Schlue*, 194 Iowa 1200, 191 N.W. 63 (1922), that had been decided shortly before the restraint (or "fencing-in") statute's enactment in 1924 to see what the common law required both before the statute was passed and after it was repealed 70 years later. In *Flesch*, the Court "recognized a claim based on a breach of ordinary care under facts that were nearly identical to those in this case [*Klobnak*]: the

defendant's horse was loose on the highway and was struck by the plaintiff's car. 688 N.W.2d at 800-01. As for the effect of the statute, the Court said:

> ***The statute merely added a new dimension in animal-owner liability: prima facie evidence of negligence***. *See, e.g., Ritchie v. Schaefer*, 254 Iowa 1107, 1113–14, 120 N.W.2d 444, 447–48 (1963) (holding that evidence that an animal was at large on the highway was prima facie evidence of the defendant's negligence); *Hansen v. Kemmish*, 201 Iowa 1008, 1015, 208 N.W. 277, 280 (1926) (same); *Stewart v. Wild*, 196 Iowa 678, 685, 195 N.W. 266, 268–69 (1923) (same); *Strait v. Bartholomew*, 195 Iowa 377, 379–80, 191 N.W. 811, 812 (1923) (same). None of our cases have suggested that the statute supplanted the common-law duty of ordinary care; it merely complimented it.

Id. at 801 (emphasis added). Another case arising from grant of a motion to dismiss, *Weber v. Madison*, 251 N.W.2d 523 (Iowa 1977), came before the statute's demise, but, as the Court explained in *Klobnak*, it fell outside of the statute's scope because it involved geese owned by the defendant and the Court read legislative intent to exclude fowl from the restraint requirement. 688 N.W.2d at 801. The Court quoted the basis for potential negligence liability for the geese causing an accident on a road:

> "[t]he [defendant's] asserted right to permit geese to run at large must be examined in light of the common-law obligation of every person to use that reasonable care under the circumstances to avoid injury to another which an ordinarily prudent person would exercise in a like situation."

Id. (quoting 251 N.W.2d at 526). In *Weber*, the plaintiff drove her car into a roadside ditch in an effort to avoid the defendant's flock of geese. The

Court explained that because the statute did not apply, "the fact the geese were on the roadway will not constitute prima facie evidence of negligence. . . . Plaintiff will be obligated to prove the negligence she alleges." 51 N.W.2d at 528-29.

The discussion in *Klobnak* pertained to the existence of a duty and was in response to the defendant's assertion that animal owners had no duty to control movement of their animals after the fencing-in statute's repeal. Having found a basic duty of ordinary care, and having rejected the defendant's only argument in favor of dismissal—lack of duty—the Court had no need to dig into the allegations about breach of the duty. As mentioned above, Klobnak 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." 688 N.W.2d at 800. That cleared the hurdle for alleging breach of duty.

Still, in *Klobnak*'s duty discussion the Court quoted other authorities giving examples of what evidence might be needed to support the breach element. For example, the Court quoted this from an Ohio case based on common law negligence:

> The owner of a domestic animal is responsible for negligence in its keeping whereby damage is occasioned. The principal test, as to whether the owner is or is not negligent, is whether he could or could not reasonably have anticipated the occurrence

> which resulted in the injury. It is a question of fact for the jury whether an owner of horses who turns them loose unattended into a field adjacent to a much-traveled highway in the nighttime, the fence of which field is in such defective condition that the horses may easily stray out onto the highway, could have anticipated that one of the horses would stray out onto the highway and collide with an automobile thereon.

Id. at 802 (quoting *Drew v. Gross*, 112 Ohio St. 485, 147 N.E. 757, 758 (1925)).

Another example of evidence of breach of the duty of ordinary care is in the Court's quotation from a Restatement comment:

> There may, however, be circumstances under which it will be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so and under other circumstances there would be no negligence. Thus if a horse is turned loose in a field that abuts upon a public highway, and there is no fence to keep him off the highway, it may reasonably be anticipated that he will wander onto it, and that, particularly in the night time, his presence there may constitute an unreasonable danger to traffic. In these cases there may be liability for negligence upon the same basis as in other negligence cases.

Id. at 803 (quoting Restatement (Second) of Torts § 518 cmt. k (1977)).

In the present summary judgment case, Singh has supplied no evidence about the accident other than McDermott's cow being in the road, McDermott owning nearby land, and Singh hitting the cow with his truck. In initial disclosures, Defendant supplied photographs of intact fencing and gates, but Singh has offered no evidence that there is anything wrong with

any of them. There is no evidence of a gap through which the cow might have escaped, nor evidence that fencing or gates do not comply with some industry standard or other requirements as to their construction.

For that matter, there is not even any evidence that the cow had been on McDermott's property before turning up on the road. Singh puts together the nearby land with the cow on the road and wants the Court to assume that the cow was on McDermott's land and under his control when it escaped onto the road. However, Plaintiff's own evidentiary submission resisting the Motion includes Defendant's Initial Disclosures, in which there is identification of Gary Huff as a person with knowledge, who is described as "Owner of property where cow in question is believed to have escaped." (App. 163)

It is not known if Plaintiff's counsel ever contacted Mr. Huff, but it is known that Plaintiff took no depositions at all. If Plaintiff made any investigation as to where the cow had been, how it got onto the road, whether there were any defects or substandard aspects of the fencing and gates, or anything else is not known. What is known is that the only facts on which Plaintiff relies in resisting summary judgment are that there was a cow in the road and McDermott owned it. Plaintiff had "extensive" time for discovery, as the District Court put it, and could have at least deposed Mr.

McDermott to learn about the cow, the relevant locations, the fencing, past escapes, if any, or any other relevant details. Discovery rules also would have allowed inspection of the property and requests for production of relevant documents. Plaintiff did none of this. He just focused on the most obvious facts requiring no effort to obtain—cow ownership and cow location when hit—and insists (quite inaccurately) that this is all he needs to support a negligence claim.

However, Plaintiff cannot rely on the isolated fact of the Defendant's ownership of a cow that turned up on a road to satisfy the burden of supporting his claim of breach of duty as the cause for the cow being there. As discussed above, *Klobnak* held that repeal of the fencing-in statute eliminated prima facie negligence for animal owners and returned this area of law to normal common law principles, which include a need to show a breach of the duty to exercise ordinary care. A person is negligent by failing to exercise reasonable care under the circumstances. *Hoyt v. Gutterz Bowl & Lounge*, 829 N.W.2d 772 (Iowa 2013). Plaintiff has supplied no evidence to support this element.

Although not in a cow case, or in any kind of animal case, the Supreme Court recently gave a good example of how a summary judgment should be assessed when a moving defendant relies on the plaintiff's lack of

evidence of breach of reasonable care. In *Breese v. City of Burlington*, 945 N.W.2d 12 (Iowa 2020), the plaintiff accused the City of negligence in the way it had designed and constructed a part of a bike path on which the plaintiff was injured. The Court noted that the City presented no evidence that it had satisfied engineering and safety standards at relevant times, and instead was arguing for summary judgment on the ground that the plaintiff had the burden to prove the City's alteration of a key part of the path had violated relevant standards but had failed to offer sufficient evidence of the standards or their breach. *Id*. at 24. The Court endorsed this approach in principle because the plaintiff had the burden of proof on the breach element, but it found sufficient evidence to support the breach-of-duty element. *Id*. The plaintiff in that case had offered in opposition to the motion an affidavit and report of an engineering expert giving the opinion and supporting documentation that the City had violated the design standard in effect at the relevant times. The City argued about flaws in the report and the bases of the expert's opinion, but the Supreme Court essentially said there at least was something there to view "in the light most favorable to the nonmoving party," and that what was in the record was enough to create a factual issue on the breach-of-duty element. *Id*.

Here there is nothing to view favorably on the key issue of breach of duty. Plaintiff himself knows nothing about how the cow came to be on the road in front of his truck. (App. 255 (68:17-23)) He has identified no expert to describe containment standards or troubleshoot problems with how the cow was contained. (App. 256 (No. 21)) And his discovery responses indicate that he has no information about the cow at all other than its ownership and its unfortunate location as he was driving on the interstate. As such, Defendant has carried his burden of showing a lack of evidence to support the breach-of-duty element. "Where substantial evidence does not exist to support each element of a plaintiff's claim, the Court may sustain the motion." *Dettmann v. Kruckenberg*, 613 N.W. 2d 238, 256 (Iowa 2000).

Singh relies solely upon the fact that the cow was in the road and leaves the questions of who was responsible for the animal's escape, how and why it happened, and the length of time that the cow was at large, to be answered by the fact finder's imagination. Our Supreme Court has held that "the fact finder must not be left to speculate about who the negligent culprit is," and that "speculation is not sufficient to generate a genuine issue of fact." *Susie v. Fam. Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 336–37 (Iowa 2020), *reh'g denied* (May 13, 2020).

In a case in which there was far more evidence about how an accident happened than here, but where a key question remained as to whether a car passenger opened the door and jumped or the door popped open due to the driver making a U-turn too fast and caused the passenger to fall out, the Supreme Court held that there was no substantial evidence to support a verdict against the driver and that directed verdict against the passenger should have been granted. *Easton v. Howard*, 751 N.W.2d 1 (Iowa 2008). In doing so, the Court explained some relevant principles:

- "Negligence is fault, and it is the plaintiff's burden to prove fault by a preponderance of the evidence. *Fanelli v. Illinois Cent. R.R.*, 246 Iowa 661, 664, 69 N.W.2d 13, 15 (1955). It is not to be assumed from the mere fact of an accident and an injury. *Id.*" *Id*. at 5.
- "'Undoubtedly it is not enough there is a mere possibility that the injury is chargeable to the negligence of defendant, and a recovery may not rest wholly on conjecture. There is no case for a jury where the evidence leaves the happening of the accident a mere matter of conjecture and as consistent with the theory of absence of negligence as with its existence. Undoubtedly the plaintiff fails if as matter of law the testimony is in equipoise.'" *Id*. at 6 (quoting

George v. Iowa & S.W. Ry., 183 Iowa 994, 997–98, 168 N.W. 322, 323 (1918)).

- "'Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right.'" *Id*. (quoting *True v. Larimore*, 255 Iowa 451, 460, 123 N.W.2d 5, 10 (1963)).

Along similar lines, the Supreme Court affirmed a directed verdict for a defendant in a case in which the plaintiff was injured when a ladder collapsed, because there was no evidence to allow a jury to choose between the ladder collapsing because a defendant co-worker failed to secure the clamps to hold it up or instead because the clamps were defective and failed under the plaintiff's weight though properly secured. *Hasselman v. Hasselman*, 596 N.W.2d 541, 546 (Iowa 1999). "When a jury is left to speculate on whether the defendant's conduct in fact caused the plaintiff's damages, the evidence is insufficient to support a finding of proximate cause." *Id*. The Court said the same conclusion was warranted about whether the co-worker had placed the ladder in an unsafe condition, because of the lack of testimony or circumstances indicating that the ladder fell for that reason. *Id*.

Plaintiff criticizes the District Court and Defendant for offering alternative ways that the cow could have come to be on the road other than some unspecified way attributable to Mr. McDermott's negligence. However, that is the very point about a vacuum of evidence leaving a fact-finder to speculate. If all it takes to establish an animal owner's liability is that the animal was in a road when the plaintiff came along, then the theory would be strict liability, not negligence, and liability would exist no matter how the animal got there—including via a funnel cloud. The way to keep the proof in the realm of negligence, as the Iowa Supreme Court requires, is to stick to the basic principle that the negligence elements dedicated to the fact finder—including breach of duty—be supported by actual facts.

This is a point that courts across the country have made in cases involving domestic animals being hit by vehicles on roads. *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); *Lee v. Mitchell Funeral Home Ambulance Service*, 606 P.2d 259 (Utah 1980) (passengers' claim against cow owners dismissed because there was not sufficient evidence of negligence on the part of the owners that might have been a causative factor in the accident to justify the submission of such issue to a jury); *Beck v. Sheppard*, 566 S.W.2d 569 (Tex. 1978) (directed verdict for owner of horse struck on road affirmed where there was no evidence that any of the fences were down or gates open, or that the horse had ever gotten out of the pasture or had any propensity for doing so, and where there were no facts or circumstances that could be said to have reasonably alerted the horse owner to the possibility that the horse had escaped the fences or gates, or that would show that the horse owner did not exercise due care); *Radojcsics v. Ohio State Reformatory*, 52 Ohio Misc. 73, 368 N.E.2d 1284 (1977) (under ordinary negligence standard, claim for injury from striking reformatory's cow on road dismissed because car owner had not demonstrated that the reformatory had notice of the escape or of any defect in the fence prior to the accident or that the fence was improperly maintained or in any way inferior to those in general use for similar

purposes); *Brauner v. Peterson*, 16 Wash. App. 531, 557 P.2d 359 (1976) (even though cow owners presented no evidence, judgment for owners affirmed where trial court refused to draw inference of negligence from only the unexplained presence of livestock on highway at night and where there was no evidence that the owners' fence, gate, or enclosure was in disrepair or that the owners had knowledge that their cows were loose on the highway).

See also Primeaux v. Kinney, 256 So. 2d 140 (La. App. 1971), *cert. denied*, 260 La. 1065, 258 So. 2d 87 (1971) (judgment against bull owner reversed because driver offered no evidence to indicate an improper maintenance of the owner's fences, or to show any defects in the fences or gates, or anything to indicate that the bull may have escaped from its confines or during any moving operations, because of negligence on the owner's part); *Rhiness v. Dansie*, 24 Utah 2d 375, 472 P.2d 428 (1970) (affirming directed verdict for owner of horse struck at night on road because mere fact that the animals escaped from the enclosure was not sufficient evidence, standing alone, to justify the submission of the owner's negligence to the jury); *Barnes v. Frank*, 28 Colo. App. 389, 472 P.2d 745 (1970) (fact that the cattle that had been enclosed in fence were on the highway did not in and of itself make the owner liable or raise a presumption of negligence against him, as the cattle may have entered on the highway

because of any number of factors, including possible acts of third persons, and the duty rested on the occupant of vehicle striking cattle to prove the owner was negligent by a preponderance of the evidence); *Beaver v. Howerton*, 223 So. 2d 62 (Fla. App. 1969) (summary judgment affirmed for owner of cow struck by truck, resulting in driver's death, where widow admitted she was unable to affirmatively demonstrate that there was any defect in the fencing or that the owner's gates were open, she had no specific facts concerning the alleged improper maintenance of the owner's fences, she had no testimony that the fences were improperly maintained or that the gates were improperly secured, she had no details as to the manner in which the owner willfully or negligently permitted the cow to run at large, and she did not know in what manner he had violated a statute); *Botz v. Krips*, 267 Minn. 362, 126 N.W.2d 446 (1964) (no basis for liability of hogs' owner to driver hitting them on road because no evidence was presented that would establish that the owner had permitted them to run at large or was guilty of negligence because they did so).

See also Poole v. Gillison, 15 F.R.D. 194 (D. Ark. 1953) (escape of animals from an enclosure is not such a departure from the ordinary course of events as to raise any inference or presumption of negligence, and it is common experience that animals often jump fences or break through them

without there being any suggestion of negligence on the part of their owners or keepers, so summary judgment for owners ruled appropriate in absence of evidence from vehicle occupants that gate was left open, or fence was inadequate or weak or in ill repair or constructed in inferior manner or of inferior materials); *Burnett v. Reyes*, 118 Cal. App. 2d Supp. 878, 256 P.2d 91 (1953) (upholding judgment against motorist who collided with cow on highway, saying there is no presumption or inference that the collision was due to negligence of the owner or person in possession of the livestock, the burden was on the motorist to prove his case without the benefit of any inference of negligence); *Pongetti v Spraggins*, 215 Miss. 397, 61 So. 2d 158 (1952) (directed verdict for calf's owner affirmed where motorist offered no proof that the owner's calf was at large on the highway with the owner's knowledge or consent or that the owner had failed to exercise due care to prevent the calf from escaping from its enclosure); *Wilson v Rule*, 169 Kan. 296, 219 P.2d 690 (1950) (presence of mule on highway was not prima facie evidence of owner's negligence, so judgment for motorist who collided with it reversed where motorist made no attempt to prove owner's negligence); *Abbott v. Howard*, 169 Kan. 305, 219 P.2d 696 (1950) (motorist required to offer evidence that owner had failed to exercise due care in enclosing horse in order to make prima facie case of negligence for

collision with unattended horse on highway, so lack of evidence required judgment for owner); *Adamcik v. Knight*, 170 S.W.2d 521 (Tex. Civ. App. 1943) (animals such as horses may often escape without fault on the part of their owners, so neither the ownership of the horse nor the ownership of the premises created a rebuttable presumption that the horse's presence on the highway was due to the negligence of either owner); *Crittenden v. Speake*, 240 Ala. 133, 198 So. 137 (1940) (judgment for motorist reversed because of lack of evidence that owner negligently permitted mule to go at large or that collision was proximate result of any negligent act by owner).

Therefore, the District Court properly held that there is no material evidence sufficient to support the negligence claim against McDermott.

II.

RES IPSA LOQUITUR ELEMENTS DO NOT APPLY.

The District Court properly rejected Plaintiff's argument that its negligence claim based on the mere presence of Defendant's cow on the road should survive summary judgment under a *res ipsa loquitur* theory.

Res ipsa loquitur is a doctrine to be applied sparingly, and only if certain prerequisites are met.

> **"Negligence must be proved, and the mere fact that an accident has occurred, with nothing more, is not evidence."** *Brewster v. United States*, 542 N.W.2d 524, 528 (Iowa 1996) (alterations, citation, and internal marks omitted). Negligence

> may be proved by circumstantial evidence. *See id.* "*Res ipsa* loquitur (Latin phrase for 'the thing speaks for itself') is one type of circumstantial evidence." *Id.* To be able to submit a case on the theory of res ipsa loquitur, there must be "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)]. The doctrine is "of limited scope, ordinarily to be applied sparingly and with caution and only where the facts and demands of justice make its application essential." *Humphrey v. Happy*, 169 N.W.2d 565, 569 (Iowa 1969).

Tamco Pork II, LLC v. Heartland Co-op, 876 N.W.2d 226, 232 (Iowa App. 2015) (emphasis added).

In the present case, *res ipsa* cannot apply because first, the Plaintiff cannot prove that the damage was caused by an instrumentality in the sole control of the Defendant, and second, he cannot prove that the occurrence causing the injury is of such a type that in the ordinary course of things it would not have happened if reasonable care had been used. The Plaintiff has no evidence, other than the bare fact of the cow's presence on the highway, to indicate that the actions or omissions of the Defendant were the cause of his injuries. Indeed, there are a number of scenarios whereby the cow could have appeared on the road absent the Defendant's negligence. *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) (mere proof of an accident is insufficient to invoke the doctrine of *res ipsa loquitur*); *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); *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); *Wilson v. Rule*, 169 Kan. 296, 219 P.2d 690 (1950) (rejecting motorist's contention that mule unattended on highway was sufficient proof of negligence under *res ipsa* theory).

Therefore, the District Court properly held that *res ipsa loquitur* does not apply.

CONCLUSION

For the reasons discussed above, the Court should affirm the decision of the District Court to grant summary judgment in favor of the Defendant and to dismiss the claim against him with prejudice.

Respectfully submitted this 17th day of January 2023.

MIKE McDERMOTT,
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CONDITIONAL NOTICE OF ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, counsel for the Defendant/Appellee desires to be heard in oral argument.

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This brief complies with the type-volume limitation of *Iowa R. App. P*. 6.903(1)(g)(1) because the brief contains approximately 7453 words, excluding the parts of the brief exempted by *Iowa R. App*. *P*. 6.903(1)(g)(1).

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