STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0136

Cole Clark,
Appellant,

vs.

Brian Goihl, et al.,
Respondents,

vs.

Andrew Arens,
Respondent.

Filed November 22, 2021
Affirmed
Jesson, Judge

Wabasha County District Court
File No. 79-CV-19-218

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Considered and decided by Bratvold, Presiding Judge; Larkin, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

On a dark November night, appellant Cole Clark sustained injuries when a car he was riding in collided with a full-grown black cow that, for unknown reasons, was loose on Highway 60. Clark sued respondents Brian and Lisa Goihl—whom Clark claimed owned the cow—for negligence. The district court granted summary judgment to the Goihls, from which Clark appeals. We affirm.

FACTS

On the night of the accident in 2016, respondent Andrew Arens drove Clark home from their shared workplace.[1] As Arens traveled east on Highway 60, he noticed another car parked facing him on the opposite side of the road. The car's headlights and flashers were active. Just after Arens passed the other car, he hit a black cow on the road. The cow kicked through the windshield and struck Clark in the head. The cow then left the scene.

A couple driving home from church—the occupants of the other car with flashers on—spotted the cow before Arens collided with it. The driver stated that they saw the cow on the side of the road, and they turned around and activated their lights to try to find it again. They witnessed Arens drive past and heard, but did not see, Arens hit the cow.

Near the time of the accident, the Goihls' oldest son got a call from a high school classmate who told him that a cow was loose on the highway near his parents' farm. The son drove down to the scene on a four-wheeler all-terrain vehicle to look for the cow. When

[1] The following facts come from depositions given by the parties and two uninterested witnesses to the accident.

he arrived at Highway 60 a few minutes later, the accident had already occurred. The son did not find a cow, but he checked the gate to the pasture of his family's farm and the electric fence that enclosed it and found both working properly. After he searched for about 15 minutes, his father Brian Goihl arrived, having noticed the accident on his way home from hauling cattle.

Brian also looked for a cow in the open fields around his pasture but did not find one. He had already checked his cattle earlier that day, and he too found the gate latched and the fence activated on the night of the accident. When he checked on his cattle the morning after the accident, all of his cattle were accounted for and none were injured. No one ever found the cow that Arens struck, and only one witness claimed to see it after the crash.

Unlike the other witnesses, the passenger of the other car stated in her deposition that she saw a teenage boy driving a four-wheeler chase the cow back towards the Goihls' pasture. At first, she stated that "[t]he son came and got the cow." But the passenger later clarified that she did not know that the person she saw was the Goihls' oldest son, and that she did not see the cow re-enter the pasture because she lost sight of it after the cow walked over the top of a hill.[2]

[2] In an affidavit made after the depositions, the Goihls' son specifically refuted the passenger's version of events. He acknowledged driving the four-wheeler around his parent's field to look for the cow. But he averred that he "did not locate any cow," and said that either the passenger was mistaken or that she saw a different boy on a four-wheeler chasing the cow.

Other deposition testimony addressed the frequency of cattle leaving their enclosures on the Goihls' farm. Brian stated that cattle get out of their enclosure very rarely and could only remember it happening "two or three times in the last ten [to] fifteen years." The son estimated that cows had escaped more than three times before, and perhaps as often as once a year. But the son stated that usually calves, instead of full-grown cows, escaped because they were small enough to fit underneath the fence. Both Goihls declared that, in the past, escaped cattle had stayed near the rest of the herd instead of wandering off alone.

In November 2018, Clark filed suit against the Goihls, alleging that they negligently allowed the cow to run free on the highway. The Goihls answered, denied Clark's allegations, and filed a third-party complaint for contribution or indemnity against Arens. Later, the Goihls moved for summary judgment and agreed to assume that they owned the cow for the purposes of their motion. In December 2020, the district court granted the Goihls' motion for summary judgment.[3] The court concluded that the Goihls were entitled to summary judgment because Clark did not show that the Goihls permitted the cow to run at large as required by Minnesota Statutes section 346.16 (2020).

Clark appeals.

DECISION

Clark argues that the district court erred by granting summary judgment to the Goihls because the record shows genuine issues of material fact regarding how the cow

[3] The district court's grant of summary judgment to the Goihls on Clark's claim also resolved the Goihls' third-party claim against Arens.

came to be on the highway. We review this grant of summary judgment de novo to determine whether the district court correctly concluded that no genuine issues of material fact exist. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). A party resisting a motion for summary judgment must provide specific facts instead of relying on speculations. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). And a defendant in a negligence action is entitled to judgment as a matter of law if the plaintiff fails to prove any of the elements of negligence. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009).

With this framework in mind, we turn to the requirements of a negligence claim. To establish negligence, Clark must show that (1) the Goihls owed a duty of care, (2) the Goihls breached that duty, (3) Clark was injured, and (4) the Goihls' breach caused his injury. *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018). The "duty" here is set forth in a statute, which forbids an owner of cattle to permit the cattle to run at large. Minn. Stat. § 346.16. Violation of this statute is negligence per se, meaning that evidence of a violation of the statute is conclusive evidence of breach of duty. *Peterson v. Pawelk*, 263 N.W.2d 634, 637 (Minn. 1978).

Accordingly, the central question before us is whether there is a genuine issue of material fact as to whether the Goihls permitted the cow to run at large in violation of the statute. If so, the claim should have gone to trial. *Eischen v. Crystal Valley Co-op.*, 835 N.W.2d 629, 635 (Minn. App. 2013), *rev. denied* (Minn. Oct. 15, 2013). To answer this question, we turn to precedent for guidance as to what constitutes permitting cattle to run at large.

In *Pigman v. Nott*, the supreme court considered a factual situation involving a crash between a car and one of two small horses that were in the road. 233 N.W.2d 287, 287 (Minn. 1975). The court explained that the statutory phrase "running at large," means "to stroll, wander, rove or ramble at will without restraint or confinement." *Id.* at 288. But an owner is not negligent per se just because their animal runs at large; the owner must *permit* this to occur. *Peterson*, 263 N.W.2d at 637 (an owner of cattle "permits" the cattle to run at large when the owner makes it possible for the animal to escape or gives the animal the opportunity to escape).[4] And the mere presence of an animal on a roadway is not, by itself, evidence that the animal's owner permitted it to run at large, the supreme court held. *Id.*

With these interpretations of Minnesota Statutes section 346.16 in mind, we consider whether there is material evidence in the record to demonstrate that the Goihls permitted the cow to run at large. We conclude there is not.

Here, the Goihls enclose their pasture with an electrified fence that prevents cattle from escaping so long as the fence is working properly. It is undisputed that both Goihls (father and son) checked the fence on the night of the accident, and they found it working and the gate latched. No evidence suggests that the cows would be able to escape from the

[4] Clark argued in his brief that the district court erred by looking to Minnesota Statutes section 346.16 for the standard of care applicable to his negligence claim. But at oral argument, counsel conceded that the district court properly applied section 346.16 to Clark's negligence claim. Consequently, we consider only whether the district court erred by concluding that Clark had not shown the Goihls permitted the cow to run at large within the meaning of section 346.16.

pasture if the fence and gate were both working correctly. Instead, the only cows that usually escape are those small enough to fit underneath the electric fence.[5]

There is no evidence of frequent past escapes which could lead a jury to find that the Goihls permitted their animals to run at large. *See Peterson*, 263 N.W.2d at 636 (stating no previous escapes occurred); *Stewart v. Frisch*, 381 N.W.2d 1, 2 (Minn. App. 1986) (observing that the "horse had escaped on previous occasions."), *rev. denied* (Minn. Mar. 27, 1986). Nor is there a history of cows that did, on rare occasion, escape from the pasture and walk to the highway. Both Goihls stated that when cows did escape, they usually stayed near the rest of the herd instead of wandering off alone. In sum, because Clark has not presented evidence that the gate was open, that the fence was not electrified, or that frequent escapes should have made the Goihls aware of the possibility that a cow could wander from their pasture onto the highway, there is not sufficient evidence to meet the statutory requirement that the Goihls "permitted" the cow to run at large. *Dyrdal*, 689 N.W.2d at 783 (noting that a party resisting summary judgment must show specific facts supporting their claims and cannot rely on speculations or inferences).

To persuade us otherwise, Clark contends that the record reflects two genuine issues of material fact concerning whether the Goihls permitted the cow to run at large.[6] First,

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[5] Brian Goihl also stated in his deposition that two or three times in the last 15 years, bulls knocked down parts of the fence while fighting. But the animal that escaped here was a cow, not a bull, and there is no evidence that any part of the fence was damaged that night.

[6] Clark also argues that a recent nonprecedential opinion by this court shows that summary judgment was not appropriate in this case. Nonprecedential opinions are not binding authority, Minn. R. Civ. App. P. 136.01, subd. 1(c). Nor is this opinion persuasive here because in that case, the plaintiff produced testimony by an independent witness that a jury

Clark argues that the passenger's deposition statement supports his conclusion that the Goihls must have left the gate open, because the passenger said she witnessed the Goihls' oldest son chase the cow back towards the pasture. But the passenger did not state that she saw either an open gate or the cow re-enter the pasture. While the passenger's statement could suggest that the Goihls owned the cow, Clark's assertion that her statement shows that the gate was open is purely speculative.[7]

Second, Clark points to inconsistencies between the statements of Brian Goihl and his son regarding the frequency of past escapes.[8] Brian Goihl testified that cattle had escaped around two or three times in the past ten or fifteen years, while his son testified that cattle had escaped more than three times and perhaps as often as once a year. But this minor inconsistency does not raise a genuine issue of fact concerning whether either Goihl lied about finding the gate latched and the fence working. Nor does either estimate of

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could have relied on to find that the defendant-farmer permitted his cattle to run at large. Clark has produced no such evidence here.

[7] Clark also argues that the fact of the animal's escape should give rise to a presumption that the Goihls were negligent under *Stewart*. 381 N.W.2d at 2. But because the issue before the *Stewart* court was whether the person who crashed into the horse was negligent instead of whether the animal's owner was negligent, the court's passing statement that a presumption "may arise" is not controlling. *Id.* at 3. And *Peterson* rejects the notion that an owner of livestock is negligent merely because an escape happens at all. 263 N.W.2d at 637. Accordingly, *Stewart* does not relieve Clark of his burden to present specific facts showing that the Goihls permitted the cow to run free.

[8] Clark also argues that there is a fact question regarding how long the son knew that a cow was loose on the road near his parents' farm. But this is not an issue of material fact because whether and how long the son knew that the cow was loose is not evidence that the Goihls permitted the cow to run at large.

infrequent past escapes, in and of itself, establish a dispute as to whether the Goihls permitted the cow in this case to run at large.[9]

In sum, the central evidence that Clark submits to establish that the Goihls permitted the cow to run at large is the fact that a cow was on Highway 60 one night in November 2016. Because the presence of an animal on a road is not sufficient to support a claim of negligence per se under Minnesota Statutes section 346.16, the district court properly granted summary judgment to the Goihls.

Affirmed.

[9] Finally, Clark argues that his negligence claim should have gone to trial because the jury could infer that the Goihls were negligent because the cow escaped at all under a doctrine called res ipsa loquitur. Res ipsa loquitur provides that, in certain circumstances, the fact that an accident happened at all raises an inference of negligence. *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 414 n.2 (Minn. 2018). But a plaintiff claiming that the defendant violated section 346.16 must show more than the presence of an animal on a road. *Peterson*, 263 N.W.2d at 637. Accordingly, Clark cannot rely on this doctrine to survive the Goihls' motion for summary judgment.