

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Holy Cow! Livestock can escape in the absence of negligence, *res ipsa loquitur* does not apply

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SECRET WARDLE NOTES

While motions based on the lack of duty or proximate cause dominate dispositive motion practice in negligence cases, *Whitby* reminds us that motions asserting “no breach of duty” must also be considered in appropriate cases.

The situations where a plaintiff can successfully invoke *res ipsa loquitur* are quite limited under Michigan law. It is the plaintiff's burden to establish all four elements, and “[e]ven with the benefit of this doctrine, ... [the] plaintiff must produce some evidence of wrongdoing beyond the mere happening of the event.” *Moore v Target Corp*, 544 F Supp 2d 604, 608 (ED Mich 2008).

Sholberg v Truman, 496 Mich 1 (2014) suggests that these types of claims could be pled under nuisance principles, although the issue was never raised in *Whitby* and it is quite possible that any nuisance theory would have failed for the same reasons that the negligence theory did – there still has to be evidence that the defendant did something wrong.

* * * *

To establish a *prima facie* case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6 (2000). While dispositive motions typically attack the first and third elements, summary disposition may also be warranted where there is insufficient evidence that the defendant did anything wrong (the second element). This was recently underscored in *Whitby v Wright*, unpublished opinion per curiam, issued July 16, 2015 (Docket No. 321272), an unusual case where several of the defendant's cows escaped from their enclosure, and some of them became involved in a motor vehicle accident. The plaintiff – who was not involved in the motor vehicle accident – was injured when, while trying to assist in the aftermath of the accident, he was “stomped on” by one of the injured cows. The trial court granted

the defendant's summary disposition on the grounds that the owner of the cows did not breach a duty owed to the plaintiff. Plaintiff appealed by right; Secret Wardle represented the defendant on appeal.

The appellate panel unanimously affirmed, although only two judges agreed about the reasons why. Judges Peter O'Connell and Donald Owens comprised the majority. Judge Michael J. Kelly "concurred in the result only." The majority opinion summarized the factual and procedural background as follows:

[The non-party driver] testified that at about 6:40 a.m. on September 24, 2011, he struck some cows that were standing in the road with his car. Whitby testified that [the driver] knocked on his door on the morning of the accident. Whitby went outside and determined that the cows belonged to Wright.

Wright testified at his deposition that he raises Black Angus cattle. According to Wright, the night before the accident, the cows were in a large lot with a five-strand electric fence and a double gate. When a police officer came to speak to him, he discovered that the gate had been knocked down and the cows were gone. Wright testified that he had previously lost calves to coyotes. He believed a coyote had scared the cows and caused them to break the gate.

According to Whitby, while trying to get the cows back into Wright's pasture, he approached a cow lying in a field and said "whoow cow" to it. The cow stood, dropped its head, and charged him. Whitby was injured.

... Whitby filed a complaint against Wright. Whitby alleged theories of common-law negligence and breach of MCL 433.12, which prohibits permitting cattle to wander. Wright moved for summary disposition under MCR 2.116(C)(10). The trial court granted summary disposition in favor of Wright because it determined there was no evidence Wright was negligent, and MCL 433.12 did not impose liability for personal injuries.... *Whitby*, unpub op at 1-2.

The two judge majority accepted the defendant's argument that MCL 433.12 did not give rise to any sort of presumption of negligence in personal injury actions because under binding Court of Appeals precedent – specifically *Gould v Atwell*, 205 Mich App 154 (1994) – the plain language of MCL 433.12 rendered it applicable only to property loss claims. *Whitby*, unpub op at 4.

The panel then turned to plaintiff's common-law negligence theory. Plaintiff argued that *res ipsa loquitur* relieved him of having to prove exactly what the defendant did wrong. To invoke this doctrine, the plaintiff must show (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; (3) the event was not due to any voluntary action or contribution on the part of the plaintiff; (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. *Whitby*, unpub op at 3. The majority held that *res ipsa loquitur* did not apply because plaintiff could not meet all four of the elements. Specifically, the majority held that "Whitby failed to ... present any evidence that cows do not normally escape enclosures absent negligence. Whitby must establish the elements of *res ipsa loquitur* in response to Wright's motion, he may not simply slap a '*res ipsa loquitur*' label on his speculations." *Id.* at 3.

Therefore, the majority held that “the trial court properly granted summary disposition to Wright because Whitby failed to present evidence to establish a disputed issue of material fact regarding whether Wright breached his duty to contain his cattle.” *Id.*

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