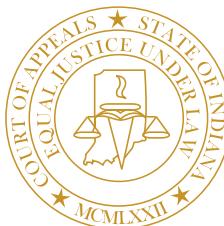


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Eliseo Montelongo,
Appellant-Plaintiff

v.

Dan Sipkema,
Appellee-Defendant

October 9, 2024
Court of Appeals Case No.
24A-CT-1257
Appeal from the Jasper Superior Court
The Honorable Russell Bailey, Judge
Trial Court Cause No.
37D01-2210-CT-954

Memorandum Decision by Judge Vaidik
Chief Judge Altice and Judge Crone concur.

Vaidik, Judge.

Case Summary

[1] Eliseo Montelongo was injured when his car struck a cow that had escaped from Dan Sipkema's farm. Montelongo sued Sipkema for negligent confinement of the cow, and the trial court entered summary judgment for Sipkema. Montelongo now appeals. Finding there are genuine issues of material fact, we reverse the trial court's entry of summary judgment for Sipkema.

Facts and Procedural History

[2] In July 2022, Montelongo was driving his 2007 Chevrolet Tahoe in Jasper County when he collided with a cow belonging to Sipkema. Sipkema, then eighty-seven years old, owned twenty to thirty beef cattle and the farm where they were kept. Sipkema's daughter, Norma Devries, cared for the cattle and had done so for the past fifteen years. Upon learning about the accident, Devries went to the farm and found that six cattle had escaped their enclosure. As there was no damage to the barn and the cattle gate as well as its hinges and chain were "in good working order," Devries determined that a cow had used its head to lift the gate off the bottom hinge, allowing six cattle to escape from under the gate. Appellant's App. Vol. II p. 37. The gate then "fell back down" and blocked the other cattle from escaping. *Id.* This was the first time that cattle

had escaped from Sipkema's farm "by lifting the gate off the hinges or otherwise going through the gate." *Id.*¹

[3] Montelongo sued Sipkema for negligent confinement of the cow. Sipkema moved for summary judgment. Montelongo opposed the motion and designated Devries's deposition as well as an affidavit and report from Alejandro Ruvalcaba Gallegos, a herdsman manager at Windy Ridge Dairy who had over twenty years' experience working with cattle. In Devries's deposition, the following exchange occurred between Montelongo's attorney and Devries:

Q Okay. Have you ever heard of something like this happening before with a cow lifting a gate?

A Yeah. It has happened. I've heard of it happening.

Q Okay. Where have you heard of it happening?

A Well, my sister has sheep . . . and cows, and they've lifted the gate off.

Q And did they use similar types of gates that had used –

A Yeah, all the same kind of gates. Yeah.

¹ In the early 2000s, cattle escaped when deer broke through a fence. *See* Appellant's App. Vol. II p. 38.

Q Okay, and you think that your sister had the same sort of incident?

A Yeah.

Q Okay. Has anything like that ever happened specifically on this farm?

A This farm. Lifting a hinge? Not that I recall.

Id. at 116. According to Gallegos's affidavit and report, he opined that to properly secure the cattle, Sipkema should have used an additional mechanism (which didn't come with the cattle gate) to prevent the gate from being lifted off its hinges, such as a screw cap, pin, or locking mechanism. *Id.* at 87, 94. He also opined that it was "not uncommon or surprising for cattle to use their heads to nudge gates, and if not properly secured, to nudge gates off of their hinges and escape their enclosure." *Id.* at 94. After a hearing, the trial court entered summary judgment for Sipkema.

[4] Montelongo now appeals.

Discussion and Decision

[5] Montelongo contends the trial court erred by entering summary judgment for Sipkema. We review a motion for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C).

[6] “It is well established that the owner of an animal has a common law duty to confine it.” *Gacsy v. Reinhart*, 142 N.E.3d 518, 523 (Ind. Ct. App. 2020) (citing *Briggs v. Finley*, 631 N.E.2d 959, 965 (Ind. Ct. App. 1994), *trans. denied*), *trans. denied*. To prevail on a claim of negligent confinement, an injured party must establish that (1) the owner placed the animal in a confinement (2) that he knew or should have known would be ineffective and (3) could reasonably foresee the animal would escape therefrom. *Id.*² The fact that an animal is loose is not enough, by itself, to support a finding of negligence. *Briggs*, 631 N.E.2d at 965. “The safeguards to be observed and the foresight to be exercised in restraining and confining an animal depend upon the circumstances of the particular case, **and are usually matters to be resolved by the fact-finder.**” *Id.* (emphasis added).

[7] Montelongo argues the trial court erred in granting summary judgment to Sipkema because there are genuine issues of material fact as to whether Sipkema knew or should have known that the confinement of his cattle was ineffective and whether the escape of his cattle was reasonably foreseeable “given the knowledge that [Devries] had of other cattle escaping in the same

² An injured party can also prevail on a claim of negligent confinement by showing that the owner knew the animal had escaped but took no reasonable steps to bring it back to confinement. *Gacsy*, 142 N.E.3d at 523 n.3. This type of negligent confinement is not at issue here.

manner from the same type of confinement before this incident and the opinion of [Gallegos] that these types of escapes are not at all uncommon” when an additional mechanism is not used. Appellant’s Br. p. 7. We agree. As Sipkema emphasizes, the designated evidence shows that his cattle had never escaped before this incident by lifting a cattle gate off its hinges. Had this been the only evidence designated, perhaps we would affirm. But here, Montelongo designated evidence from Gallegos³ that it is “not uncommon or surprising for cattle to use their heads to nudge gates, and if not properly secured, to nudge gates off of their hinges and escape their enclosure.” Montelongo also designated evidence that Devries’s sister had cattle escape in a similar manner. Given this evidence, the safeguards to be observed and the foresight to be exercised are matters for the trier of fact. *See Briggs*, 631 N.E.2d at 965. We therefore reverse the trial court’s entry of summary judgment for Sipkema.

[8] Reversed.

Altice, C.J., and Crone, J., concur.

³ Both Montelongo and the trial court refer to Gallegos as an expert. *See, e.g.*, Appellant’s App. Vol. II p. 11. In his appellee’s brief, Sipkema claims that Gallegos is not an expert. *See* Appellee’s Br. p. 4. At the summary-judgment hearing, however, Sipkema’s counsel said, “[W]e haven’t fought [the expert battle] yet, but for purposes of this motion, I’ll call him an expert[.]” Tr. Vol. II p. 9.

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