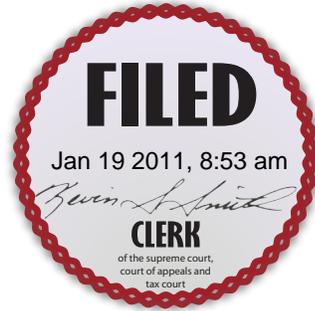


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

FRANK E. WILLIS,)
)
Appellant-Plaintiff,)
)
vs.)
)
KEITH HOLDER,)
)
Appellee-Defendant.)

No. 33A05-1009-CT-577

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0802-CT-7

January 19, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff Frank E. Willis appeals the trial court's order granting summary judgment in favor of appellee-defendant Keith Holder on Willis's complaint for negligence. The complaint sought damages following an incident in which one of Holder's horses escaped confinement, causing Willis's vehicle to collide with the animal, resulting in physical injuries to Willis. Willis argues that there are genuine issues of material fact as to whether Holder knew or should have known that his fences were ineffective to confine the horse and whether it was reasonably foreseeable that the horse would escape. Finding that Holder is entitled to judgment as a matter of law, we affirm.

FACTS

Holder has maintained livestock on his farm for over forty years. In that time, no animals had escaped until the incident herein. There is a fence around the property that is approximately 48 inches high, which is the standard height for a rural farm fence. Additionally, there was barbed wire or woven wire above the highest point of the fence along the edges of the largest pasture. The small pasture, from which the horse escaped, was enclosed with 16-foot-long cattle panels that were 48 inches high and attached to wood or steel fence posts. Holder checked his fence on a daily basis for defects, and noticed no defects in the fence in the twenty-four hours before Willis's accident.

On October 5, 2007, at approximately 5:30 a.m., Willis was traveling on West 200 South in Greensboro. Willis's vehicle collided with Holder's horse, which had escaped confinement, causing Willis to sustain personal injuries. Holder was unaware of the animal's escape until his wife awakened him after she heard the collision. After the

collision, Holder noticed an area of fence near his driveway that was bent out of shape. He had not noticed the defect when he examined the fence the night before, and he likely would have noticed it during his examination given its proximity to his driveway.

On February 11, 2008, Willis filed a complaint against Holder, seeking damages for Holder's alleged negligence in confining the horse. On April 8, 2010, Holder filed a motion for summary judgment. Following a hearing, the trial court granted the motion on August 16, 2010, finding as follows:

[Holder] had experience with horses and closed and locked the gate the night before the horse escaped while [Holder] was sleeping. The genuine material undisputed facts as set forth above do not support a finding that [Holder] could reasonably foresee that the [horse] would escape. Therefore, there are no genuine issues of material fact for a trier of fact to determine, and [Holder] is entitled to Summary Judgment as a matter of law pursuant to Trial Rule 56.

Appellant's App. p. 6-7. Willis now appeals.

DISCUSSION AND DECISION

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving

party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

To prevail in a negligence action, the plaintiff must establish (1) a duty flowing from the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from that breach. Briggs v. Finley, 631 N.E.2d 959, 963 (Ind. Ct. App. 1994).

The owner of an animal has a common law duty to confine it, but the escape of the animal is not negligence per se on the part of the owner. Id. at 965. To prevail on a claim of negligent confinement, the plaintiff must establish

(1) that the owner placed the animal in confinement which he knew or should have known would be ineffective and could reasonably foresee the animal would escape therefrom, or (2) that the owner knew the animal had escaped but took no reasonable steps to bring it back to confinement.

Id. (emphasis added). In other words, “the mere fact that an animal is loose is not alone sufficient cause or basis to support a finding of negligence.” Id.

Here, Willis concedes that the second portion of the negligent confinement test is not at issue herein. Consequently, the only issues before us are (1) whether Holder placed the horse in confinement that he knew or should have known would be ineffective, and (2) whether Holder could reasonably foresee that the horse would escape from that confinement. Willis must establish genuine issues of material fact with respect to both prongs of the test.

It is undisputed that Holder has maintained livestock on his farm for over forty years. In that time, no animals had escaped until the incident herein. There is a fence

around the property that is approximately 48 inches high, which is the standard height for a rural farm fence. The small pasture, from which the horse escaped, was enclosed with 16-foot-long cattle panels that were 48 inches high and attached to wood or steel fence posts. Holder checked his fence on a daily basis for defects, and noticed no defects in the fence in the twenty-four hours before Willis's accident.

Willis makes much of evidence that the horse was flighty or jumpy, but that evidence is insufficient to establish that Holder could have reasonably foreseen that the horse would escape from the locked, gated, non-defective fence, which had been in place for twenty years and adequately confined all of his livestock until this incident. In short, Holder did everything that he could to ensure that his livestock would stay confined. The horse escaped anyway, but sometimes, accidents happen. Although Willis's accident was lamentable, we can only conclude as a matter of law that it was not Holder's fault. Consequently, the trial court properly granted summary judgment in Holder's favor.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.