

1988

James Hornsby v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, a Utah corporation sole, Charles Giblett, John Sutton, and John Does I through X, inclusive: Brief of Respondents John Sutton and Mary Sutton

Utah Supreme Court

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

.A10

DOCKET NO. **880031-CA**

JAMES HORNSBY,

:

Appellant-Plaintiff,

:

vs.

:

CORPORATION OF THE PRESIDING  
BISHOP OF THE CHURCH OF JESUS  
CHRIST OF LATTER-DAY SAINTS,  
a Utah corporation sole,  
CHARLES GIBLETT, JOHN SUTTON,  
and JOHN DOES, I through X,  
inclusive,

:

:

:

:

Appeal from Third  
District Court,  
Honorable Timothy Hanson  
District Court Judge  
No. C-83-5019

**88-0031-CA**

Utah Supreme Court  
No. 860007

Respondents-Defendants.:

BRIEF OF RESPONDENTS JOHN SUTTON AND MARY SUTTON

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**FILED**

**JUL 29 1986**

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JAMES HORNSBY, :  
Appellant-Plaintiff, : Appeal from Third  
vs. : District Court,  
 : Honorable Timothy Hanson  
 : District Court Judge  
CORPORATION OF THE PRESIDING : No. C-83-5019  
BISHOP OF THE CHURCH OF JESUS :  
CHRIST OF LATTER-DAY SAINTS, :  
a Utah corporation sole, :  
CHARLES GIBLETT, JOHN SUTTON, :  
and JOHN DOES, I through X, : Utah Supreme Court  
inclusive, : No. 860007  
Respondents-Defendants.:

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IN THE SUPREME COURT OF THE STATE OF UTAH

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a Utah corporation sole, :  
CHARLES GIBLETT, JOHN SUTTON, :  
and JOHN DOES, I through X, : Utah Supreme Court  
inclusive, : No. 860007  
Respondents-Defendants.:

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STATEMENT OF THE FACTS

Defendants Sutton incorporate by reference the "Statement of the Case" as set forth in defendants LDS Church and Giblett's brief, with the following additional facts:

1. From 7975 West (accident site), which is the driveway to the Haslam property where the cow crossed the road and Hornsby laid down his bike, to the corner of 8200 West and 2820 South where plaintiff Hornsby made a right hand turn (R. 812), the distance, as measured by John Sutton, is 375 feet (R. 576, 578 and Exhibit 9).

2. From 7975 West (accident site) to where Mary Sutton parked her vehicle, with its emergency light flashing (R.



799, 782), just off the traveled portion of the eastbound lane of 2820 South and where Mary Sutton was standing by her driver's side door on the hardtop of the eastbound lane waving her arms attempting to warn Hornsby as he passed by her and her vehicle, the distance, as measured by John Sutton, is 210 feet (R. 578, 579 and Exhibit G; 9).

3. From Mary Sutton's parked vehicle on 2820 South to 8200 West the distance is 165 feet (R. 792 and Exhibit 7, 9). As Hornsby drove the 165 feet on 2820 South in the eastbound lane from the intersection of 8200 West a) he passed Mary Sutton standing on the hardtop in the eastbound lane waving her arms in an attempt to warn Hornsby of potential danger ahead, and (b) he passed her parked vehicle with its emergency lights flashing. At the time he passed her, she said he was accelerating and exceeding the speed limit, which was 35 mph. (R. 799, 802, 806 and 891). Hornsby said he was going 30 mph. when he laid his motorcycle down at the time of the accident (R. 926)

4. As Hornsby drove the additional 210 feet on 2820 South to the accident site at 7975 West he passed John Sutton who was standing on the hardtop in the eastbound lane with his back to eastbound traffic watching for the cow to come from the back of the Haslam property so that if it came out of the driveway at 7975 West, he could attempt to direct the cow back to his fenced

property across 2820 South (R. 576 and Exhibit 5). His mere presence in the eastbound lane of 2820 South constituted a warning of potential danger ahead to an approaching motorist such as Hornsby.

5. Hornsby testified that Mary Sutton's vehicle was 10-15 feet from the corner of 8200 West and 2820 South, which is where he drew it in his deposition (Exhibit 38), that he turned his head to look at Mary Sutton and when he turned back, the cow was there in the middle of the road, 10-15 feet in front of Mary Sutton's vehicle (R. 934-935). Hornsby believed he saw the cow two seconds after he passed Mary Sutton's vehicle and that the first time he saw the cow it was in the middle of the road (R. 935). At that time, he testified in his deposition he was going 15-20 mph. (but changed his testimony at trial to 30 mph.) (R. 926) and that he could stop his vehicle in 10 feet when traveling 15-20 mph. (R. 936). He testified he took his eyes off of the road to look at the girl (Mary Sutton) and when he looked back, the cow was in front of him (R. 937).

6. Immediately after Hornsby had laid his motorcycle down and was sitting in the street, he was questioned as to whether or not he had seen Mary Sutton attempting to warn him and in response, according to Mary Sutton he stated: "If I had realized what that girl was trying to tell me this probably

wouldn't have happened." and according to John Sutton, he stated: "I wished I'd slowed up when that girl was waving at me or something, and I wouldn't be here now." (R. 586). Hornsby did not deny having made such a statement.

7. Don Stewart, an expert in handling and loading livestock, testified that the manner in which the two cows were loaded, given the facilities available as viewed in Exhibits 1, 2, 3 and 4, was in accordance with the customary and usual way of loading cattle in this community and was a reasonable and safe way to load (R. 875-876). He testified that hundreds of cattle a day are loaded the same way at the stockyards and that he has done it the same way at John Sutton's premises without ever having a problem (R. 876).

8. Steve Williams, an expert in handling and loading livestock, testified that the manner in which the two 700 pound cows were loaded, given the facilities as viewed in Exhibits 1, 2, 3 and 4, complied with the normal and usual practice in the Salt Lake County area (R. 905, 912).

9. Garth Boswell, an expert who has either supervised or participated in the loading and unloading of 5,000 to 10,000 head of cattle per year over the last 10 years (R. 501), testified that, assuming that two cows each weighing 700 pounds each loaded as was attempted in this case, as indicated in

Exhibits 1, 2, 3 and 4 and using bailing wire to secure the corral gate in the trailer with the hook secured in the loop, it was his opinion such practice of securing the trailer to the corral was a customary way of loading cattle in this community and that he had done it himself that way about 5,000 times (R. 502-504).

10. John Sutton testified that he had had four or five years experience in loading cows at his facility with trailers prior to the accident, that over that time he had loaded "a hundred or so" cows in the same way he was attempting to load on the day of the accident and that he had never had a cow escape utilizing such a loading process other than this one (R. 572).

#### SUMMARY OF ARGUMENT

Defendants Sutton incorporate by reference the "Summary of Argument" as set forth in defendants LDS Church and Giblett's brief, with the following additional arguments.

1. Whether or not the court properly conducted its voir dire examination regarding potential partiality due to the involvement of the LDS Church has no bearing upon the verdict of the jury in favor of defendants Sutton who were found not to be negligent in any manner and against plaintiff Hornsby, who was found 100% at fault. Prejudice or lack thereof regarding the LDS Church should have no bearing upon the verdict of the jury in favor of defendants Sutton.

2. Whether or not it was improper for defense counsel for the LDS Church and Giblett to refer to his client LDS Church as the "Welfare Farm," should have no bearing upon the jury verdict in favor of defendants Sutton.

#### ARGUMENT

##### POINT I

THERE WAS NO REVERSIBLE ERROR BY THE TRIAL COURT JUDGE IN THE COURT'S VOIR DIRE EXAMINATION OF PROSPECTIVE JURORS REGARDING POTENTIAL PARTIALITY DUE TO INVOLVEMENT WITH THE DEFENDANT CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (THIS POINT DOES NOT APPLY TO DEFENDANTS SUTTON)

This point applies only to defendants LDS Church and Giblett and does not apply to defendants Sutton. Whether or not the jury may have been prejudiced in favor of defendants LDS Church and Giblett by the error alleged by plaintiff should have no effect upon the decision of the jury finding that defendant Suttons were not negligent.

##### POINT II

THERE WAS NO REVERSIBLE ERROR IN ALLOWING DEFENSE COUNSEL FOR THE LDS CHURCH AND GIBLETT TO REFER TO HIS CLIENT AS "THE WELFARE FARM" (THIS POINT DOES NOT APPLY TO DEFENDANTS SUTTON)

This point applies only to defendants LDS Church and Giblett and does not apply to defendants Sutton. Whether or not the jury may have been prejudiced in favor of defendants LDS

Church and Giblett by the error alleged by plaintiff should have no effect upon the decision of the jury finding that defendant Suttons were not negligent.

POINT III

THE TRIAL COURT PROPERLY REFUSED TO GIVE AN  
INSTRUCTION ON RES IPSA LOQUITUR

Defendants Sutton incorporate by reference the arguments made under Point III of defendants LDS Church and Giblett's brief with the following additional argument.

A. The district court did not commit prejudicial error of law by refusing to instruct the jury on res ipsa loquitur because plaintiff failed to meet his burden of establishing all three evidentiary prerequisites necessary to invoke the doctrine.

In Ballow v. Monroe, 699 P.2d 718 (Utah 1985), the Utah Supreme Court reiterated the three evidentiary prerequisites to application of the doctrine of res ipsa loquitur:

The plaintiff must prove that: (1) the event causing the damage is of a type that ordinarily would not happen except for someone's negligence; (2) the damage must have been caused by an agency or instrumentality within the exclusive control of the defendant; and, (3) the plaintiff's own use of the agency or instrumentality was not primarily responsible for the injury.  
[Citations omitted.]

Ballow, 699 P.2d at 721.

With respect to the first prerequisite, the court in Ballow specifically held that plaintiff, before he may rely upon res ipsa loquitur, must introduce evidence that the occurrence of the incident was more probably than not caused by negligence:

Before a plaintiff is entitled to a jury instruction on res ipsa loquitur, the plaintiff must have presented evidence that the occurrence of the incident is "more probably than not caused by negligence." [Citation omitted.] The plaintiff need not eliminate all possible inferences of non-negligence, but the balance of probabilities must weigh in favor of negligence, or res ipsa loquitur does not apply.

The doctrine of res ipsa loquitur has no application unless it can be shown from past experience that the occurrence causing the disability is more likely the result of negligence than some other cause. . . . In . . . Tomei v. Henning, 67 Cal.2d 319 [62 Cal.Rptr. 9, 431 P.2d 633 (1967)], the Supreme Court of [California] had this to say:

Since the res ipsa loquitur instruction permits the jury to infer negligence from the happening of the accident alone, there must be a basis either in common knowledge or expert testimony that when such an accident occurs, it is more probably than not the result of negligence.

Ballow, 699 P.2d at 722 (emphasis added). In short, "[w]hen . . . the probabilities of a situation are outside the realm of common knowledge, expert evidence may be used to establish the necessary foundational probabilities." Id. (emphasis added).

In Ballow, plaintiff brought an action against defendant to recover damages for the loss of approximately 100 acres of wheat and several rods of fencing owned by plaintiff which were destroyed by a fire apparently caused by defendant when swathing his adjoining field. The evidence at trial tended to establish that the risk of fire was inherent in normal swathing under the conditions which existed at the time of the accident. Consequently, the Utah Supreme Court affirmed the trial court's refusal to give a *res ipsa loquitur* instruction:

The plaintiff in this case failed to establish a foundation warranting *res ipsa loquitur* instructions. The evidence casts no light on whether the fire which burned plaintiff's property was probably caused by defendant's negligence. Plaintiff's testimony was that fires are virtually unavoidable when swathing and that fires "just happen," even when exercising reasonable care. On this testimony, the jury could, of course, have found that defendant had a duty to take reasonable precautions to prevent the spread of fire, but that raises no issue concerning *res ipsa loquitur*.



Id., at 723 (emphasis added).

In Reed v. Molnar, 67 Ohio St.2d 76, 423 N.E.2d 140 (1981), the Ohio Supreme Court stated as follows:

A division of authority exists on the question of the applicability of res ipsa loquitur to animal escape cases. Without passing on the first branch of the foregoing test, we find that it may 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. Thus, the doctrine is inapplicable and appellants were not prejudiced by the trial court's refusal to instruct the jury on res ipsa loquitur.

In coming to this conclusion we are not unmindful of the legislative recognition implicit in R.C. 951.09 that animals may escape without fault or negligence of their owners. Similarly, there has been judicial recognition that cattle and other domestic animals can escape from perfectly adequate confines. [Citations omitted.]

Reed, 423 N.E.2d at 145 (footnote omitted; emphasis added).

In Kusy v. K-Mart Apparel Corporation, 681 P.2d 1232 (Utah 1984), the Utah Supreme Court required the same three prerequisites for the application of the doctrine of res ipsa loquitur but expressed them a little differently as follows:

- (1) That the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed;
- (2) that the plaintiff's own use or

operation of the agency or instrumentality was not primarily responsible for the injury; and (3) that the agency or instrumentality causing the injury was under the exclusive management or control of the defendant.

Based on the foregoing authority, plaintiff failed to meet the first prerequisite of the doctrine of res ipsa loquitur because the

accident (motorcyclist laying down motorcycle to avoid collision with cow darting into roadway) was of the kind which, in the ordinary course of events, (would or could happen if due care is not observed.)

There were three separate circumstances at three separate intervals which existed in the road ahead which would have alerted a motorcyclist exercising due care of a potential hazard or danger ahead, which Hornsby ignored or failed to observe and respond to in this case:

1. At 375 feet from accident site. Hornsby could have observed a stopped vehicle with its emergency lights flashing just off the traveled portion of the eastbound lane about 165 feet ahead of him. If he had observed the same, he should have proceeded with caution.

2. At 210 feet from accident site. Hornsby could have observed a woman standing in his lane next to the stopped vehicle waving her arms in an attempt to warn him of a potential hazard or danger ahead.

3. At 210 feet from accident site. Hornsby could have observed a man standing in his lane with his back to him. The mere presence of a man in such a position would have alerted a reasonably prudent motorcyclist to proceed with caution.

If, as Hornsby testified, he was going 30 mph., which is 45 feet per second, it would have taken him almost 5 seconds to reach the accident site, clearly enough time to slow his vehicle, find out why two people were standing in his lane of travel and proceed slowly with caution. By his own testimony, he took his eyes off the road when he passed Mary Sutton and when he looked back, the cow was in the middle of the road. The cow did not appear out of nowhere. It had to come from the side of the road (Point A) in order to get to the middle of the road (Point B). It would have taken some time to get from Point A to Point B. Hornsby, after disregarding the warning given by Mary Sutton, traveled a considerable distance without looking ahead. Obviously, if Hornsby was looking ahead and driving at a reasonable speed, he easily could have seen John Sutton standing in the road ahead with his back to him, he could have seen the cow approaching the road, slowed down, allowed the cow to proceed and avoid having to lay his

motorcycle down on the road. If Hornsby had exercised due care, there would have been no accident.

Thus, the "event causing the damage" was the negligence of Hornsby, to whom the jury assessed 100% of the fault. Since the "event causing the damage" was the negligence of Hornsby and because the accident was of the kind which happens when due care is not observed," the first prerequisite to the doctrine of res ipsa loquitur was not satisfied.

With respect to the second prerequisite necessary to invoke res ipsa loquitur, the Utah Supreme Court held in Kusy v. K-Mart Apparel Fashion Corp., supra, that defendant's exclusive control of the agency or instrumentality which caused plaintiff's injury must continue to and include the time of the accident. In Denver & R.G.R. Co. v. Ashton-Whyte-Skillicorn Co., 49 Utah 82, 162 P. 83 (1916), plaintiff brought an action against defendant to recover for damage to and destruction of certain personal property, including two railroad cars, allegedly caused by defendant's negligence. The evidence at trial demonstrated plaintiff had loaned two railroad cars to defendant for use in its business. Somehow the cars escaped from defendant's premises and rolled down plaintiff's railroad track, eventually colliding with and causing damage to other railroad cars. Plaintiff relied on the

doctrine of res ipsa loquitur. The trial court nonsuited plaintiff, and it appealed. On appeal, the Utah Supreme Court affirmed the nonsuit and held that plaintiff could not rely on res ipsa loquitur because it had failed to prove the cars "were under the immediate control and management of the defendant" at the time they escaped and eventually collided with plaintiff's other cars. Denver & R.G.R. Co., 162 P. at 85.

In Zampos v. United States Smelting, Refining and Mining Co., 206 F.2d 171, 177 (10th Cir. 1953) (applying Utah law), the Court held that if the circumstances surrounding the accident in which plaintiff was injured, "are equally consistent with a cause which would not be attributable to negligence, the doctrine [of res ipsa loquitur] does not apply. [Citation omitted.]" In Trigg v. City and County of Denver, Docket No. 83-2397 (filed March 4, 1986, U.S. Court of Appeals for the Tenth Circuit) (applying Colorado law), the Court reiterated that a plaintiff invoking res ipsa loquitur "must demonstrate the absence of equally probable alternative causes for [his] injury." Trigg, slip opinion p.6. In short, "[i]f there is any other cause apparent to which the injury may with equal fairness be attributed, the reason for a res ipsa loquitur inference fails, and the rule should not be

invoked." Id., citing, Restatement (Second) of Torts § 328D, comment f (1965).

The decisions of the Utah Supreme Court are in accord with the foregoing. Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471, 474 (1956) (trial court correctly refused to instruct on res ipsa loquitur where "there was no reasonable basis shown in the evidence which would justify a conclusion that there was any greater likelihood" that accident was causally connected to instrumentality over which defendant had control); Jenson v. S. H. Kress & Co., 87 Utah 434, 49 P.2d 958, 960-961 (1935) (no basis in common knowledge or record to infer that broken glass shelf in defendant's merchantile establishment, which caused plaintiff's injuries, occurred more probably than not as a result of defendant's negligence.)

Based upon the foregoing authority, there are two reasons why plaintiff failed to meet the second prerequisite. First, there is absolutely no proof in the record that defendants' control over the cow continued to the time of the accident.

Second, plaintiff demonstrably failed to prove the absence of equally probable alternative causes for the accident such as plaintiff Hornsby's own negligence described herein. A

res ipsa loquitur instruction is improper unless plaintiff successfully demonstrates that the cause he proposes is more probably than not the effective causative agent. In this case, he completely failed to meet that burden.

In Poole v. Gillison, 15 F.R.D. 194 (E.D.Ark. 1953) the court held as follows:

Now, a mule is not an inanimate object without any independent volition, but is a live animal possessed of a brain and an intelligence of its own; the mules in this case broke out of their enclosure in the night time of their own volition while [defendant] was in bed. Under such circumstances we do not think it can be said that they were under his exclusive control and management at the time that they broke out of the lot to the extent necessary to invoke the res ipsa doctrine. Moreover, even if it be assumed that they were under his exclusive control and management while they were in the lot, it does not follow that they were so subject at the time of the collision, and, under Arkansas law, it is ordinarily required to invoke said doctrine that the exclusive control of the defendant shall have continued up to the time of the plaintiff's injury. [Citation omitted.]

Poole, 15 F.R.D. at 199 (emphasis added).

Because (1) there is no basis in common knowledge that the presence of a cow on a public highway is more probably than not the result of negligence, and (2) it is difficult, if not impossible, to prove defendant maintained exclusive control over the animal up to and including the time of the accident,

the majority of courts have refused, either on statutory or common law grounds, to instruct the jury on res ipsa loquitur in a case similar to this one. Annotation, Liability of Owner of Animal for Damage to Motor Vehicle or Injury to Person Riding Therein Resulting from Collision with Domestic Animal at Large in Street or Highway, 29 A.L.R.4th 431, 468-470 (1984) (citing 13 jurisdictions holding res ipsa loquitur inapplicable compared with 6 jurisdictions holding it applicable).

The plaintiff's proffered instruction no. 24 on res ipsa loquitur, attached as addendum I to plaintiffs brief, specified "the bailing wire that came undone" as the instrumentality over which the defendants exercised "exclusive management and control" and not the cow. The instruction did not fairly and accurately state the law of the state of Utah.

As clearly demonstrated above, however, the doctrine of res ipsa loquitur, even when appropriate under all the circumstances, does not create an inference of a causal connection between the inferred negligence and plaintiff's injury, nor does it absolve plaintiff of the burden of proving specific causation. Thus, plaintiff's instructions on res ipsa loquitur was inaccurate. It is axiomatic that the failure to give inaccurate res ipsa loquitur instructions is harmless



error. Ballow, 699 P.2d at 723; Brownlow v. Aman, 740 F.2d 1476, 1490 (10th Cir. 1984).

B. The trial court did not commit prejudicial error of law by refusing to instruct the jury on res ipsa loquitur because Utah Code Ann. § 41-6-38 (1953) as amended, as construed by the Utah Supreme Court, proscribes any inference of negligence based upon the mere presence of livestock on a public highway.

By implication, if not expressly, § 41-6-38 proscribes any inference of negligence arising from the mere presence of a cow on a public road. In other words, the burden remains on every "occupant of a motor vehicle" allegedly injured as a result of a collision with livestock, to plead and prove specific acts of negligence on the part of the owner. That was precisely the holding of this Court when it construed the statute in Hyrum Smith Estate Co. v. Peterson, 227 F.2d 442 (10th Cir. 1955) (applying Utah law). In Hyrum Smith, plaintiff brought an action against defendant to recover damages for personal injuries sustained when the motorcycle he was operating collided with a horse owned by defendant on a public highway. At trial, plaintiff relied both upon res ipsa loquitur and also on defendant's active negligence. The district court, interpreting § 41-6-38, refused to

instruct the jury on *res ipsa loquitur*. Notwithstanding, the jury returned its verdict in plaintiff's favor, and defendant appealed. On appeal, no error was assigned with respect to the district court's failure to give a *res ipsa loquitur* instruction, and this Court wisely declined to consider the issue further.

Nevertheless, in its opinion in Hyrum Smith, the Court was required to interpret § 41-6-38 in order to adequately respond to defendant's claims of court error. After citing the statute, the Court made the following observations:

So far as we are advised, this section has never been construed by the Supreme Court of Utah. We, however, feel that the language of the statute providing that where a collision occurs between a motor vehicle and livestock drifting upon the highway "there is no presumption that such collision was due to negligence on behalf of the owner or the person in possession of such livestock" is clear and unambiguous and should be given the meaning naturally flowing therefrom. To us the language means, and in considering this question it will be held, that under Utah law there is no presumption that appellant was guilty in permitting the horses to be upon the highway under the conditions they were found there, and that the burden rested upon the plaintiff to establish acts of negligence to entitle him to have his case submitted to the jury.

Hyrum Smith, 227 F.2d at 444 (emphasis added). In short, the Court's specific focus on the statutory requirement of proof of "acts of negligence," forecloses plaintiff's

contention that § 41-6-38 permits him to rely on res ipsa loquitur.

Section 41-6-38 was interpreted by the Utah Supreme Court for the first time in Rhiness v. Dansie, 24 Utah 2d 375, 472 P.2d 428 (1970). In that case, plaintiffs' motor vehicle struck one of defendant's horses on U.S. Highway 6-50 in Spanish Fork Canyon, Utah. Plaintiffs sued defendant, but did not rely on res ipsa loquitur either in the trial court or on appeal. Plaintiffs successfully established that on the night of the accident, immediately prior to the collision, one of defendant's gates was left partially open. Defendant had been on his property during that day but testified he left the gate securely fastened. Rhiness, 472 P.2d at 429. Based upon the foregoing evidence, the trial court granted defendant's motion for directed verdict at the close of plaintiffs' evidence. Plaintiffs appealed.

The Utah Supreme Court affirmed. To properly dispose of plaintiffs' contentions on appeal, the court was required to interpret § 41-6-38. The court specifically held that section proscribed any inference of negligence from the mere fact defendant's horse escaped from his pasture and wandered onto the highway:

In order for the plaintiffs to recover in this action, they must show two things: First, that the highway was fenced on both sides; and second, that the horses got upon the highway through the negligence of the defendant. The mere fact that the animals escaped from the enclosure is not sufficient evidence, standing alone, to justify the submission of defendant's negligence to the jury.

Rhiness, 472 P.2d at 429-430 (emphasis added).

Based upon the foregoing, Judge Hanson correctly ruled that, under Utah law, plaintiff in this case was not entitled to a jury instruction on res ipsa loquitur.

#### POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN INSTRUCTION ON NEGLIGENCE PER SE

Defendants Sutton incorporate by reference the arguments made under Point IV of defendants LDS Church and Giblett's brief with the following additional argument.

Section 41-6-16 Utah Code Annotated (1953) as amended) provides as follows:

The provisions of this act shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this act unless expressly authorized herein. Local authorities may, however, adopt regulations consistent with this act, and additional traffic regulations which are not in conflict therewith.

(Emphasis added.)

Section 41-6-38 Utah Code Annotated, (1953) as amended which is entitled "Livestock on highway - Collision, action for damages," which is a part of the "act" referred to in 41-6-16, provides in pertinent part as follows:

No person owning or controlling the possession of any livestock, shall willfully or negligently permit any such livestock to stray upon or remain unaccompanied by a person in charge or control thereof upon a public highway, both sides of which are adjoined by property which is separated from such highway by a fence . . . . No person shall drive any such livestock upon, over or across any public highway during the period from half an hour after sunset to half an hour before sunrise, without keeping a sufficient number of herders with warning lights on continual duty to open the road so as to permit the passage of vehicles. In any civil action brought by the owner, driver or occupant of a motor vehicle or by their personal representatives or assignees, or by the owner of the livestock for damages caused by collision with any domestic animal or animals on a highway, there is no presumption that such collision was due to negligence on behalf of the owner or the person in possession of such livestock.

(Emphasis added.)

Section 10-10-3 Salt Lake County Ordinance entitled "Unattended Animals on Highway Prohibited" provides in pertinent part as follows:

Every person . . . herding . . . or  
allowing to run at large, or causing to be  
herded . . . or allowed to run at large,  
any . . . cow . . . upon any of the public  
highways of the county shall be guilty of a  
misdemeanor.

To the extent Section 10-10-3, the County  
Ordinance or rule or regulation, is "in conflict with the  
provisions of this act (41-6-38)," it, Section 10-10-3, is  
not enforceable. Since Section 41-6-38 covers civil actions  
involving "Livestock on Highway" (Section 10-10-3 covers  
criminal matters involving "animals on highway"), Section  
41-6-38, a legislative enactment and statute, preempts Section  
10-10-3, a county ordinance, rule or regulation.

Thus, the Court properly refused to give plaintiff's  
proffered supplemental instructions on negligence per se,  
copies of which are attached as addendum 2, 3, 4 and 5 to  
plaintiff's brief. Such instructions were improper and not in  
accordance with Utah law.

#### POINT V

THERE WAS NO ERROR IN THE TRIAL COURTS'  
REFUSAL TO GIVE AN INSTRUCTION ON STRICT  
LIABILITY

Defendants Sutton incorporate by referenced the  
arguments made under Point V of defendant LDS Church and  
Giblett's brief with the following additional argument.

There is no evidence in the record that the cow in question had a "dangerous or vicious tendency" as alleged by plaintiff. The mere fact that the cow somehow escaped from the LDS Church property to Sutton's property and then remained there without incident or problem until John Sutton and Charles Giblett attempted to load it with one other cow so as to return the escaped cow to the LDS Church property certainly is insufficient to put John Sutton on notice that he is dealing with a cow with a "dangerous or vicious propensity" to injure or damage others.

Thus, the court properly refused to give plaintiff's proffered instruction no. 25, a copy of which is attached as addendum 6 to plaintiff's brief. Such instruction would have been improper under the facts and evidence in this case.

#### CONCLUSION

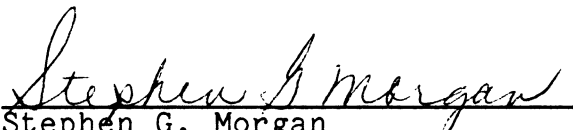
Defendants Sutton submit that regardless of how the court rules with respect to the voir dire examination by the court and/or the alleged impropriety of counsel for the LDS Church in referring to his client as the "Welfare Farm," such ruling should not affect the Suttons and the jury verdict in their favor and against the plaintiff should be affirmed.

Defendant Suttons also submit that the requested jury instructions on the issues of res ipsa loquitur, negligence per

se and strict liability were properly refused under the facts of this case. Plaintiff was given a fair trial under instructions permitting the jury to find any or all of the defendants negligent in their conduct in loading the cattle, attempting to contain the heifer after it escaped, and in the manner of giving warning to oncoming traffic. The jury decided that defendants were not negligent but that plaintiff was negligent in his approach to the accident scene. The judgment of the trial court based upon the special verdict should be affirmed.

DATED this 29 day of July, 1986.

MORGAN, SCALLEY & READING

  
Stephen G. Morgan  
Attorneys for Defendants  
Suttons



CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand-delivered four true and accurate copies of the foregoing brief of defendants respondents, this 29 day of July, 1986, to the following at their respective addresses:

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MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing brief of defendants - respondents, to Laura Boyer, 3167 West 4700 South, Salt Lake City, Utah 84111, first class, postage prepaid, this 29 day of July, 1986.

Stephen B Morgan