IN THE MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

Appellate Case No.: SD24382

Floyd J. Sill and Billye Sill,

Appellants

vs.

Burlington Northern Railroad and

Santa Fe Railway Company,

Respondents

Appeal from the Circuit Court of Greene County, Missouri
Case No. 100CC0236
Honorable Don E. Burrell, Judge

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

In this action Plaintiff alleges he was injured when his vehicle collided with a horse that escaped through a fence owned by Burlington Northern Railroad. The claim against Burlington Northern was alleged in Count III. Burlington Northern filed a motion to dismiss for failure to state a claim and that motion was sustained. Counts against other Defendants remain pending. The Court determined that there was no just reason for delay and the judgment dismissing Count III against Burlington Northern Railroad was designated as final for purpose of appeal.

Under Article V, Section 3 of the Constitution of Missouri, this case is not one in which the Supreme Court has exclusive jurisdiction and therefore, this case falls within the general appellate jurisdiction. The judgment is final for purposes of appeal pursuant to Missouri Rule 74.01(b). Further, this appeal is from the Circuit Court of Greene County, Missouri, and pursuant to §477.060 RSMo., the Missouri Court of Appeals, Southern District, has territorial jurisdiction.

STATEMENT OF FACTS

Plaintiffs' Floyd Sill and Billye Sill, his wife, filed a Third Amended Petition for Personal Injury alleging that on April 1, 1999 Floyd Sill was driving a vehicle in a generally easterly direction on US Highway 60 in Webster County, Missouri when he collided with a horse that was on the roadway. Count III of the Third Amended Petition alleges that the Defendant Burlington Northern Railroad owned the fence through which the horse escaped and that Burlington Northern Railroad was negligent in failing to maintain the fence and that as a direct result Plaintiff was injured. (L.F. 5). Burlington Northern Railroad filed a motion to dismiss for failure to state a claim. (L.F. 20). The Court sustained that motion. (L.F. 60).

Count III is contained on pages 14 through 17 of the Legal File. Count III alleges that Burlington Northern Railroad owned and maintained the fence through which the horse escaped and that pursuant to §389.650 RSMo. the Defendant was required to maintain the fence along the right-of-way. Count III also alleged common law negligence without reference to §389.650 RSMo. The pertinent

allegations of negligence are set out in paragraphs 23 and 24 of the Third Amended Petition as follows:

> "23. That the fence owned by Defendant was damaged, in disrepair or inadequately built and as a result thereof livestock that had been on the land owned by Michael W. Burks escaped through the fence belonging to Burlington Northern Railroad and in the early morning hours of April 1, 1999 said livestock was on the traveling portion of US Highway 60 at the location described above and a vehicle driven by the Plaintiff collided with the livestock causing injury described below.
>
> 24. That Defendant Burlington Northern Railroad was careless and negligent in the following respects:
>
> a. In failing to erect and maintain a lawful fence as required by §389.650 of the revised Missouri statutes.
>
> b. In failing to inspect the fence.
>
> c. In failing to repair and maintain the fence.
>
> d. In failing to erect a fence that was adequate to contain the livestock.
>
> e. That Defendant, pursuant to §389.650 is charged with the duty of erecting and maintaining lawful fences on its railroad right-of-way and that Defendant has adopted procedures for maintaining and inspecting the fences that are inadequate. Specifically, the procedures for inspection are inadequate in the following respects:

i. The Defendant has no procedure for inspecting the fences to determine the age and condition of the fence but instead relies upon complaints from landowners or the general public to learn about problems with the fences.

ii. Defendant fails to have a system for responding to complaints and the failure to have a reliable **system** discourages complaints, further eroding the effectiveness of the inadequate procedures.

iii. That the inadequate procedures of Defendant have resulted in numerous injuries to property and persons from damaged fences and the Defendant knew that its procedures resulted in a danger to the public but Defendant continued to use unsafe procedures and failed to implement safe procedures.

f. That Defendants failed to have an adequate program to train its employees in the proper in the proper procedures for inspecting and repairing said fences and the Defendant knew that the failure to have an adequate training program resulted in a danger to the public because of numerous injuries to property and persons caused by damaged fences but Defendant continued the inadequate training program and failed to implement an adequate training program." (L.F. 15-16).

In paragraphs 25 and 26 of Plaintiffs' Petition, Plaintiff alleges that as a result of the negligence of the railroad, the horse escaped through the Burlington Northern fence, entered the roadway where the collision occurred and as a direct result of said negligence, the Plaintiff was injured. (L.F. 16-17).

Defendant railroad filed a motion to dismiss claiming that the Third Amended Petition failed to state a cause of action against the railroad. (L.F. 20-22).

The Court dismissed Count III holding that §389.650 created a duty for Burlington Northern to erect and maintain a fence but "that duty is for the benefit of adjoining landowners and for those persons lawfully traveling upon the railroad's right-of-way" . . . and " . . . Plaintiffs are outside the class of persons intended to benefit from the protection provided by the statute." (L.F. 30). The Court also held that any failure of Burlington Northern to maintain the fence "cannot be considered the proximate cause of injuries which occur outside of the railroad's right-of-way." (L.F. 30). The Court dismissed Count III of the Third Amended Petition, the only Count against Burlington Northern Railroad, "with prejudice to the filing of the same."

Plaintiffs filed a motion for reconsideration (L.F. 31) and a motion for leave to file a Fourth Amended Petition. (Supp. L.F.[1] 3-5). The Fourth Amended

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[1] The Legal File is confusing regarding the Fourth Amended Petition and requires some explanation. There is a document called the "Fourth Amended Petition for Personal Injury" contained on page 49 of the Legal

Petition as it pertains to this appeal was substantially similar to the Third Amended Petition but added allegations to paragraphs 24(d) and 25(d) that " . . . the fence was rusty and brittle and the trees, shrubs and other vegetation were allowed to grow in the fence line and this created a distortion and stretching of the fence . . . and that the fence had been in this deteriorated condition for a long period of time and that the railroad knew or should have known that the deteriorated condition of the fence and that Defendant was negligent in failing to inspect the fence, in failing to repair and maintain the fence . . .". (Supp. L.F. 12-14).

Paragraph 24 of the Fourth Amended Petition makes no mention of the statutory duty under §389.650 and states a cause of action for common law negligence as follows:

> "24. That Defendant Burlington Northern Railroad was careless and negligent in the following respects:
>
> a. In failing to inspect the fence..

File, however, the Fourth Amended Petition contained on page 49 was filed pursuant to the Court's order of May 14, 2001 and is not the same petition that was attached to the motion for leave to file Fourth Amended Petition. The Fourth Amended Petition that was the subject of the Motion to Amend is contained in the Supplemental Legal File at pages 3 through 19.

b. In failing to repair and maintain the fence.

c. In failing erect a fence that was adequate to contain the livestock.

d. That the fence was rusty and brittle and that trees, shrubs and other vegetation were allowed to grow in the fence line and this created a distortion and stretching of the fence and a risk that limbs would fall on the fence and break the fence and that the fence had been in this deteriorated condition for a long period of time and that the railroad knew or should have known of the deteriorated condition of the fence and that the Defendant was negligent in failing to inspect the fence, in failing to repair and maintain the fence and that the fence was in a condition that it could not safely contain livestock and was therefore not reasonably safe.

e. That Defendant has a duty of erecting and maintaining lawful fences on its railroad right-of-way or alternatively that the railroad erected the fence on the right-of-way and having erected the fence has an obligation to repair and maintain the fence and that Defendant has adopted procedures for maintaining and inspecting the fences that are inadequate. Specifically, the procedures for inspection are inadequate in the following respects:

i. The Defendant has no procedure for inspecting the fences to determine the age and condition of the fence but instead relies upon complaints from landowners or the general public to learn about problems with the fences.

ii. Defendant fails to have a system for responding to complaints and the failure to have a reliable system discourages

complaints, further eroding the effectiveness of the inadequate procedures.

iii. That the inadequate procedures of Defendant have resulted in numerous injuries to property and persons from damaged fences and the Defendant knew that its procedures resulted in a danger to the public but Defendant continued to use unsafe procedures and failed to implement safe procedures.

f. That Defendants failed to have an adequate program to train its employees in the proper procedures for inspecting and repairing said fences and the Defendant knew that the failure to have an adequate training program resulted in a danger to the public because of numerous injuries to property and persons caused by damaged fences but Defendant continued the inadequate training program and failed to implement an adequate training program." (Supp. L.F. 13-14).

Paragraph 23 of the Fourth Amended Petition also states a cause of action for common law negligence that is redundant and for purposes of this appeal need not be considered.

Paragraph 25 states a cause of action under § 387.650 which imposed a duty on the railroad to erect and maintain a fence along its right-of-way. Paragraph 25 of the Fourth Amended Petition is as follows:

"25. That §389.650 of the Missouri Revised Statutes requires that Defendant Burlington Northern Railroad erect and maintain a

lawful fence along its right-of-way and said Defendant was careless and negligent in the following respects:

a. In failing to erect a fence that was adequate to contain livestock.

b. In failing to repair and maintain the fence.

c. In failing to inspect the fence.

d. That the fence was rusty and brittle and that trees, shrubs and other vegetation were allowed to grow in the fence line and this created a distortion and stretching of the fence and a risk that limbs would fall on the fence and break the fence and that the fence had been in this deteriorated condition for a long period of time and that the railroad knew or should have known of the deteriorated condition of the fence and that the Defendant was negligent in failing to closely inspect the fence, in failing to repair and maintain the fence and that the fence was in a condition that it could not safely contain livestock and wa not reasonably safe.

e. That Defendant, pursuant to §389.650, is charged with the duty of erecting and maintaining lawful fences on the railroad right-of-way, or alternatively that the Defendant did erect the fence along the right-of-way and therefore had a duty to maintain it, and the Defendant has adopted procedures for maintaining and inspecting the fences that are inadequate. Specifically, the procedures for inspection are inadequate in the following respects:

i. The Defendant has no procedure for inspecting the fences to determine the age and condition of the fence but instead relies upon complaints from landowners to the general public to learn about problems with the fences.

ii. Defendant fails to have a system for responding to complaints and the failure to have a reliable system discourages complaints, further eroding the effectiveness of the inadequate procedures.

iii. That the inadequate procedures of Defendant have resulted in numerous injuries to property and persons from damaged fences and the Defendant knew that its procedures resulted in a danger to the public but Defendant continued to use unsafe procedures and failed to implement safe procedures.

f. That Defendant failed to have an adequate program to train its employees in proper procedures for inspecting and repairing fences and the Defendant knew that the failure to have an adequate training program resulted in a danger to the public because of numerous injuries to property and persons caused by damaged fences but Defendant continued the inadequate training program and failed to implement an adequate training program." (Supp. L.F. 15-16).

At the hearing on the Motion for Reconsideration and Motion to File the Fourth Amended Petition, Plaintiffs' attorney discussed with the Court the fact that Count III implied that that horse escaped through the Burlington Northern fence but did not specifically make that allegation. Plaintiffs' counsel then made an oral motion to amend paragraph 22 of the Fourth Amended Petition to add the following language:

> "That on April 1, 1999, livestock escaped through a fence owned by Burlington Northern Railroad and Plaintiff Floyd Smith (sic) collided with the livestock on the public highway causing damage to the Plaintiff described below." (Tr. 8-9).

At the end of the oral arguments, the Court noted that no objections were made to the oral motion and "It looks appropriate to me." The Court indicated that "If I allow a Fourth Amended Petition, I don't see anything prejudicial about making the one change by interlineation that's been requested." (Tr. 44).

After oral argument, the Court entered its order denying the Motion for Reconsideration and letting stand the previous order to dismiss Count III and denying Plaintiffs' Motion to File a Fourth Amended Petition and denying the oral motion to amend the Fourth Amended Petition by interlineation as moot. (L.F. 44). Plaintiff was allowed to file a Fourth Amended Petition amending allegations against Defendants Michael Burks and Bonnie Burks, which are not relevant to the issues now before this Court. (Tr. 44).

Plaintiff then filed a Motion requesting Modification of the Court's Order to add a determination "that there is no just reason for delay and that this judgment is designated as final for purpose of appeal." (L.F. 57). On June 27, 2001, the

Court filed its amended judgment finding that there was no just reason for delay in designating the judgment as final for purpose of appeal. (L.F. 60).

Plaintiff/Appellant filed their Notice of Appeal on July 23, 2001. (L.F. 8).

POINTS RELIED ON

I

THE COURT ERRED IN DISMISSING COUNT III OF PLAINTIFF'S THIRD AMENDED PETITION. COUNT III ALLEGES THAT A HORSE ESCAPED THROUGH A FENCE OWNED BY DEFENDANT BURLINGTON NORTHERN, COLLIDED WITH PLAINTIFF'S VEHICLE ON A PUBLIC ROADWAY AND THAT BURLINGTON NORTHERN WAS NEGLIGENT IN FAILING TO MAINTAIN THE FENCE AND THAT THE NEGLIGENCE CAUSED PLAINTIFF'S INJURY. THE COURT ERRED IN HOLDING THAT THE FAILURE TO MAINTAIN THE FENCE COULD NOT, AS A MATTER OF LAW, BE THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY BECAUSE:

A. THE ALLEGATIONS SATISFY THE "BUT FOR" TEST ADOPTED BY MISSOURI IN THE CASE OF *CALLAHAN V. CARDINAL GLENNON HOSPITAL*, 863 S.W.2d 852 (Mo. banc 1993) AND

B. THE ESCAPE OF THE HORSE AND THE INJURY TO PLAINTIFF IS A REASONABLE AND PROBABLE CONSEQUENCE OF DEFENDANT'S NEGLIGENCE AS REQUIRED BY *CALLAHAN V. CARDINAL GLENNON HOSPITAL,* 863 S.W.2d 852 (Mo. banc 1993).

Cases

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)26, 27, 28, 35

Deuschle v. Jobe, 30 S.W.3d 215 (Mo. App. 2000 36

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Hoover's Dairy, Inc. v. Mid-America Dairymen, 700 S.W.2d 426, 431 (Mo. banc 1985) 35, 38

Isabel v. Hannibal and St. Joseph Rail Company, 60 Mo. 475 (1875) 34

King v. Furry, 317 S.W.2d 690 (Mo. App. 1958) 37

Koller v. Ranger Insurance Company, 569 S.W.2d 372 (Mo. App. 1978.. 39, 42, 43

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Robinson v. State Highway and Transportation Commission, 24 S.W.3d 67 (Mo. App. 2000) 31

Simonian v. Gebers Heating and Air Conditioning, Inc., 957 S.W. 2d 472 (Mo. App. 1997) 31

II

THE COURT ERRED IN HOLDING THAT DEFENDANT BURLINGTON NORTHERN HAD NO DUTY TO MAINTAIN THE FENCE AND IN DISMISSING COUNT III OF PLAINTIFF'S THIRD AMENDED PETITION BECAUSE:

A. §389.650 RSMo REQUIRES IN PART THAT "EVERY RAILROAD CORPORATION…SHALL ERECT AND MAINTAIN LAWFUL FENCES ON THE SIDE OF THE ROAD WHERE THE SAME PASSES THROUGH, ALONG OR ADJOINING ENCLOSED OR CULTIVATED OR UNENCLOSED LANDS…" AND

B. EVEN IF THE STATUTE DOES NOT CREATE THE DUTY TO MAINTAIN THE FENCE, THE RAILROAD HAS A COMMON LAW DUTY TO MAINTAIN THE FENCE.

Hoover's Dairy, Inc. v. Mid-America Dairymen, 700 S.W.2d 426, 431 (Mo. banc 1985) 33, 36

Dickson v. Omaha and St. Louis Rail Company, 27 S.W. 476 (Mo. 1894) 31

Lins v. Boeckeler Lumber Company, 221 Mo. App. 181, 299 S.W. 150 34

Deuschle v. Jobe, 30 S.W.3d 215 (Mo. App. 2000 ..... 30, 33, 34

III

THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION FOR LEAVE TO FILE ITS FOURTH AMENDED PETITION BECAUSE:

A. THE FOURTH AMENDED PETITION STATED A CAUSE OF ACTION AGAINST BURLINGTON NORTHERN RAILROAD FOR THE REASONS DISCUSSED IN THE FIRST AND SECOND POINTS RELIED ON AND

B. OVERRULING THE MOTION TO AMEND WAS A VIOLATION OF MISSOURI RULE 55.33 WHICH PROVIDES THAT LEAVE TO AMEND SHALL BE FREELY GRANTED AND A VIOLATION OF THE ESTABLISHED RULE THAT ORDINARILY LEAVE TO AMEND SHALL BE GRANTED AFTER A MOTION TO DISMISS IS SUSTAINED.

Koller v. Ranger Insurance Company, 569 S.W.2d 372 (Mo. App. 1978.. 37, 40, 41

Lins v. Boeckeler Lumber Company, 221 Mo. App. 181, 299 S.W. 150 39

IV

THE COURT ERRED IN FAILING TO SUSTAIN PLAINTIFF'S VERBAL MOTION TO SUPPLEMENT THE MOTION FOR LEAVE TO AMEND BECAUSE:

A. THE MOTION ASKED TO ADD AN ALLEGATION THAT THE HORSE ESCAPED THROUGH THE BURLINGTON NORTHERN FENCE, WHICH WAS ALLEGED IN ALL OTHER COUNTS, BUT OMITTED IN COUNT III AGAINST BURLINGTON NORTHERN.

B. ALL PARTIES AGREED THAT THE ORAL MOTION SHOULD BE SUSTAINED AND THE COURT INDICATED AN INTENTION TO SUSTAIN THE ORAL MOTION.

Cases

Callahan v. Cardinal Glennon Hospital, 863 S.W.2d 852 (Mo. banc 1993)26, 27, 28, 35

Deuschle v. Jobe, 30 S.W.3d 215 (Mo. App. 2000 36

Dickson v. Omaha and St. Louis Rail Company, 27 S.W. 476 (Mo. 1894) 33

Dietrich v. Hannibal and St. Joseph Railroad Company, 1901 W.L. 169 (Mo. App. 1901) 26

Hoover's Dairy, Inc. v. Mid-America Dairymen, 700 S.W.2d 426, 431 (Mo. banc 1985).....35, 38

Isabel v. Hannibal and St. Joseph Rail Company, 60 Mo. 475 (1875).....34

King v. Furry, 317 S.W.2d 690 (Mo. App. 1958).....37

Koller v. Ranger Insurance Company, 569 S.W.2d 372 (Mo. App. 1978..39, 42, 43

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Phillips vs. Authorized Investors Group, Inc., 625 S.W.2d 917 (Mo. App. 1981) 24

Robinson v. State Highway and Transportation Commission, 24 S.W.3d 67 (Mo. App. 2000).....31

Simonian v. Gebers Heating and Air Conditioning, Inc., 957 S.W. 2d 472 (Mo. App. 1997).....31

ARGUMENT

I

THE COURT ERRED IN DISMISSING COUNT III OF PLAINTIFF'S THIRD AMENDED PETITION. COUNT III ALLEGES THAT A HORSE ESCAPED THROUGH A FENCE OWNED BY DEFENDANT BURLINGTON NORTHERN, COLLIDED WITH PLAINTIFF'S VEHICLE ON A PUBLIC ROADWAY AND THAT BURLINGTON NORTHERN WAS NEGLIGENT IN FAILING TO MAINTAIN THE FENCE. THE COURT ERRED IN HOLDING THAT THE FAILURE TO MAINTAIN THE FENCE COULD NOT, AS A MATTER OF LAW, BE THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY BECAUSE:

A. THE ALLEGATIONS SATISFY THE "BUT FOR" TEST ADOPTED BY MISSOURI IN THE CASE OF *CALLAHAN V. CARDINAL GLENNON HOSPITAL*, 863 S.W.2d 852 (Mo. banc 1993) AND

B. THE ESCAPE OF THE HORSE AND THE INJURY TO PLAINTIFF IS A REASONABLE AND PROBABLE CONSEQUENCE OF DEFENDANT'S NEGLIGENCE AS REQUIRED BY *CALLAHAN V. CARDINAL GLENNON HOSPITAL*, 863 S.W.2d 852 (Mo. banc 1993).

This point relied on deals solely with whether Count III of Plaintiff's petition states a cause of action. This presents an issue of law, with no factual

disputes and, therefore, this court can make its own independent evaluation of the application of law, without deference to the trial court's opinion. See *Phillips vs. Authorized Investors Group, Inc.,* 625 S.W.2d 917 (Mo. App. 1981).

Count III of Plaintiff's Third Amended Petition generally alleges that Defendant Burlington Northern Railroad owned and maintained a fence adjacent to real estate owned by Michael W. Burks. On April 1, 1999 the livestock escaped through the fence owned by Burlington Northern and went onto the traveling portion of US Highway 60 and collided with the vehicle driven by Plaintiff, causing Plaintiff injury. Paragraph 23 alleges that the fence "was damaged, in disrepair or inadequately built and that as a result thereof, livestock that had been on the land owned by Michael W. Burks escaped through the fence…". (L.F. 15). Paragraph 24 states the alleged negligence as follows:

> "24. That Defendant Burlington Northern Railroad was careless and negligent in the following respects:
>
> a. In failing to erect and maintain a lawful fence as required by §389.650 of the revised Missouri statutes.
>
> b. In failing to inspect the fence.
>
> c. In failing to repair and maintain the fence.
>
> d. In failing to erect a fence that was adequate to contain the livestock.
>
> e. That Defendant, pursuant to §389.650 is charged with the duty of erecting and maintaining lawful fences on its railroad right-of-way and that Defendant has adopted procedures for maintaining and inspecting the fences that are inadequate. Specifically, the procedures for inspection are inadequate in the following respects:
>
> i. The Defendant has no procedure for inspecting the fences to determine the age and condition of the fence

but instead relies upon complaints from landowners or the general public to learn about problems with the fences.

ii. Defendant fails to have a system for responding to complaints and the failure to have a reliable system discourages complaints, further eroding the effectiveness of the inadequate procedures.

iii. That the inadequate procedures of Defendant have resulted in numerous injuries to property and persons from damaged fences and the Defendant knew that its procedures resulted in a danger to the public but Defendant continued to use unsafe procedures and failed to implement safe procedures.

f. That Defendants failed to have an adequate program to train its employees in the proper in the proper procedures for inspecting and repairing said fences and the Defendant knew that the failure to have an adequate training program resulted in a danger to the public because of numerous injuries to property and persons caused by damaged fences but Defendant continued the inadequate training program and failed to implement an adequate training program." (L.F. 15-16).

Subparagraphs a, e and f alleges failure to erect and maintain the fence as required by §389.650 RSMo. and subparagraphs b through d allege a common law failure to inspect, repair and maintain the fence.

Defendant Burlington Northern filed a Motion to Dismiss. (L.F. 10). The Motion to Dismiss is directed at paragraphs e and f which allege a duty under §389.650. No mention is made in the Motion to Dismiss paragraphs a through d. Defendant's argument in the Motion to Dismiss was generally twofold. First, that the claim against Burlington Northern is not "supported by, or contemplated within §389.650 RSMo." and that Plaintiff has failed to allege that Burlington Northern had any notice of the defective condition of the fence as required by

Dietrich v. Hannibal and St. Joseph Railroad Company, 1901 W.L. 169 (Mo. App. 1901).

In response to this Motion, the Court entered its order on April 2, 2001 dismissing Count III of Plaintiff's Third Amended Petition in its "entirety, with prejudice to the refiling of the same." (L.F. 30). The Court stated the reasons as follows:

1. §389.650 RSMo creates a duty on Burlington Northern to erect and maintain a lawful fence but the duty is for the benefit of adjoining landowners and for those persons lawfully traveling upon the railroad's right-of-way and is not intended for the benefit of motorists who hit livestock escaping through Burlington Northern fence.

2. Any failure of Burlington Northern to maintain a lawful fence cannot be considered the proximate cause of injuries which occur outside the railroad's right-of-way. (L.F. 30).

This point relied on will deal with the second element of the Court's Order, specifically, whether the failure of Burlington Northern to maintain a lawful fence can be considered the proximate cause of Plaintiff's injury. The landmark case on causation is *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. banc 1993) The Missouri Supreme Court established a two-pronged test for causation. The first prong is the "but for" test and the second prong is the "proximate cause" test.

The "but for" causation test is satisfied "if the event would not have occurred 'but for' [the Defendant's conduct]". Id. at 861. In describing the "but for" test, the Court stated:

> "Some lawyers and judges have come to look upon the 'but for' test as a particularly onerous and difficult test for causation. Nothing could be further from the truth. 'But for' is an absolute minimum for causation because it is merely causation in fact. Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with." Id. at 861.

In the case at bar the "but for" test is clearly met. If the fence had been adequately erected and maintained to contain livestock, Plaintiff's injury would not have occurred.

The inquiry for the proximate cause test is whether the injury is the "reasonable and probable consequence of the act or omission of the defendant." Id. at 865. In its discussion, the Missouri Supreme Court states as follows:

> "Proximate cause requires something in addition to a 'but for' causation test because the 'but for' causation test serves only to exclude items that are not causal in fact; it will include items that are causal in fact but that would be unreasonable to base liability upon because they are too far removed from the ultimate injury or damage. For example, carried to the ridiculous, 'but for' the mother and father of the defendant conceiving the defendant and bringing him into this world, the accident would not have happened. Obviously, this is not a basis for holding the mother and father liable." Id. at 865.

In *Callahan*, the Supreme Court then discusses what is required in addition to the "but for" test. The Court first notes that a few jurisdictions require a

"foreseeability test" having its origin in the famous case of *Palsgraf v. Long Island Railway Company*, 248 N.Y. 339, 162 N.E. 99 (1928). The Court in *Callahan* rejects the pure "foreseeability test" and bases proximate cause on whether the injury is "a reasonable and probable consequence" of the negligent act. The court stated:

> "Missouri, like many other states, has not applied a pure foreseeability test; we have generally said that the injury must be a reasonable and probable consequence of the act or omission of the defendant. [Citations omitted.] This is generally a 'look back' test but, to the extent it requires that the injury be 'natural and probable' it probably includes a sprinkling of foreseeability. To the extent the damages are surprising, unexpected, or freakish, they may not be the natural and probable consequences of a defendant's actions. If the facts involved an extended scenario involving multiple persons and events with potential intervening causes, then the requirement that the damages that result be the natural and probable consequence of defendant's conduct comes into play and may cut off liability." Id. at 865.

Amplifying this requirement, the Court stated:

> "It is of course unnecessary that the party charged should have anticipated the very injury complained of or anticipated that it would have happened in the exact manner that it did. All that is necessary is that he knew or ought to have known that there was an appreciable chance some injury would result." Id. at 865.

This Court recently discussed the issue of proximate cause in the case of *Letsinger v. Drury College*, Case Number 24037, 24160 decided November 26, 2001. Appellant believes that the *Letsinger* case and other Missouri cases discussed below make the result in the case at bar clear. In the *Letsinger* case, the plaintiff was a resident in the Kappa Alpha fraternity house at Drury College in

Springfield, Missouri. The house was owned by Drury College and Drury had a contractual obligation to repair the facility. On the night of plaintiff's injury the plaintiff received a telephone call regarding some girls who had been visiting at the Kappa Alpha (K.A.) house. A disagreement arose and the plaintiff told the person on the phone "to either shut up or come over and fight." The caller then made some statement which the plaintiff understood to be a reference to shooting a gun. After the conversation, the plaintiff became concerned that the caller was going to come to the Kappa Alpha house and do him violence and the plaintiff tried to close and lock the front door of the K.A. house. He found that although the door could be closed completely, it would not latch. After trying unsuccessfully to lock the door, the plaintiff went to the interior landing of the K.A. house and stood on the first set of stairs for approximately ten minutes. While at this location, the plaintiff saw the front door open and two men enter the K.A. house. Plaintiff then took a couple of steps toward the men. One of the men, whom plaintiff did not know and had never seen, pulled a gun from behind his back and shot the plaintiff. Plaintiff's petition is based in negligence and alleges that pursuant to an agreement between Drury and Kappa Alpha, that Drury College had the duty to properly maintain and repair the K.A. house and that plaintiff's injury was the proximate cause of a negligent failure of Drury to perform its duty. The Court found that there was a duty to maintain the facility. This Court then considered the issue of whether the failure to fix the lock could be

the proximate cause of plaintiff's injury. The defendant argued that plaintiff's injury was not a foreseeable consequence of the negligence and that the "trash talking" between the plaintiff and the assailant and the threats exchanged with one another and plaintiff's ignoring of the assailant's threats were unforeseeable events and that recovery should not be allowed for "so attenuated a chain of causation". This Court rejected those arguments and found that there were sufficient facts for a jury to find a proximate cause. In so holding, this Court stated:

> "With 'proximate cause' thus explained, the issues here are whether (1) on looking back, after the shooting, could reasonable minds differ about whether the shooting of Plaintiff appeared to be a 'reasonable and probable' consequence of Defendant's failure to replace a defective door on its fraternity house; and (2) in the exercise of reasonable diligence, could Defendant have foreseen or should they have foreseen that some type of injury to K.A. house occupants was a 'natural and probable' consequence of their failure to replace allegedly defective doors on the K.A. house? We answer 'yes' to these questions and conclude that a factfinder—not this court—should make the initial decision as to whether [Daniel's assailant's] actions were 'surprising, unexpected or freakish.'" Id. at opinion page 9.

In the case at bar, the chain of causation is much more direct than the *Letsinger* case. There were no surprising or unanticipated acts. The petition alleged a deteriorated fence that had not been properly maintained. The horse escaped through the deteriorated fence and wandered onto the roadway, causing plaintiff's injury. In the *Letsinger* case, there is an intervening criminal act. In the case at bar, the only intervening act is the escape of the horse through a deteriorated fence. The purpose of the fence was to contain the horses. If the

fence deteriorated and was inadequate to contain the horses, escape of the horses was a reasonable and probable consequence.

Other analogous cases include *Simonian v. Gebers Heating and Air Conditioning, Inc.*, 957 S.W. 2d 472 (Mo. App. 1997) holding that plaintiff stated a cause of action when he claimed that a negligent recurring false alarm caused hearing loss and *Robinson v. State Highway and Transportation Commission*, 24 S.W.3d 67 (Mo. App. 2000) reversing a summary judgment in which a driver was drowned in flood waters after an adjacent property owner constructed a levee to protect crops.

II

THE COURT ERRED IN HOLDING THAT DEFENDANT BURLINGTON NORTHERN HAD NO DUTY TO MAINTAIN THE FENCE AND IN DISMISSING COUNT III OF PLAINTIFF'S THIRD AMENDED PETITION BECAUSE:

A. §389.650 RSMo REQUIRES IN PART THAT "EVERY RAILROAD CORPORATION…SHALL ERECT AND MAINTAIN LAWFUL FENCES ON THE SIDE OF THE ROAD WHERE THE SAME PASSES THROUGH, ALONG OR ADJOINING ENCLOSED OR CULTIVATED OR UNENCLOSED LANDS…" AND

B. EVEN IF THE STATUTE DOES NOT CREATE THE DUTY TO MAINTAIN THE FENCE, THE RAILROAD HAS A COMMON LAW DUTY TO MAINTAIN THE FENCE.

This point relied on deals with whether, as a matter of law, defendant Burlington Northern had a duty to maintain its fence. The issue of duty is strictly a matter of law, presenting no factually disputed issues, and this court can make its own independent evaluation of the law without deference to the findings of the trial court. See *Dueschele vs. Jobe*, 30 S.W. 3rd 215 (Mo. App. 2000).

In dismissing Count III of the Third Amended Petition the Court held that Burlington Northern Railroad had no duty to the Plaintiff to erect and maintain a lawful fence along its right-of-way. The Court expressly held that §389.650

RSMo. did not create a duty running to the Plaintiff. Since Count III was dismissed, by implication, the Court must have also found that there was no common law duty.

IS THERE A DUTY TO PLAINTIFF UNDER §389.650 RSMo?

§389.650 RSMo. states in part that "every railroad corporation…shall erect and maintain lawful fences on the side of the road where the same passes through, along or adjoining enclosed or cultivated or unenclosed lands…". The general duty of railroads to erect and maintain fences along the right-of-way have been in effect for many years, the first enactment of the statute being in 1853. There are a number of cases interpreting the obligation of the railroad under the current and previous statutes. Appellant could not find any case under this statute involving a vehicular collision with livestock that escaped through a railroad fence. However, in the case of *Dickson v. Omaha and St. Louis Rail Company*, 27 S.W. 476 (Mo. 1894),. James Dickson was an employee of the railroad and was killed when the locomotive he was operating collided with a bull that had strayed upon the tracks through a defective fence. His widow brought a wrongful death action. The defendant claimed that the statute requiring railroad companies to make and maintain fences was designed solely to prevent injuries to domestic animals of adjacent landowners. The Court noted that the statute, in its express terms, gives a right of action to owners of animals killed as a consequence of defective railroad

fences but held that the duty extended to protect the traveling public. In so holding, the Court stated:

> "The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all persons upon railroad trains, who are exposed to danger by such obstructions, whether they be passengers or employees." Id. at 478.

The Court noted the right of train passengers to recover from personal injuries incurred on account of defective fences was well established in other jurisdictions, citing cases from Wisconsin, Arkansas, Texas and Michigan.

In the case of *Isabel v. Hannibal and St. Joseph Rail Company*, 60 Mo. 475 (1875), a child came onto a railroad track where there was no fence and was killed. Again, the railroad argued that the statute "was intended to prevent cattle from straying on the track, but not to guard against children coming thereon." In rejecting this argument, the Court stated:

> "Unquestionably, when the law enjoins a duty, and commands a company to build a fence along the line of its road, where it runs through a man's farm, the omission to build is a breach of that duty which it owes to those for whose protection the fence was designed. Whilst it may be primarily intended to secure one object, it may incidentally have an effect on others. All must go together in determining the measure of the obligation." Id. at 7.

IS THERE A DUTY TO PLAINTIFF UNDER THE COMMON LAW?

Even if the Court is correct in its holding that §389.650 RSMo. creates no duty, Plaintiffs have still stated a cause of action for common law negligence. In paragraphs b-d, Plaintiffs have alleged that Defendant was careless and negligent

in failing to inspect, repair and maintain the fence, without reference to §389.650 RSMo. This case, therefore, presents the issue of whether, as a matter of law, the railroad is protected from liability because it has no duty. In *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo. banc 1993, the Court noted that the issues of duty and causation are intertwined. Missouri case law suggests that while the two concepts are intertwined, there are, at least in theory, two separate elements. See *Hoover's Dairy, Inc. v. Mid-America Dairymen,* 700 S.W.2d 426, 431 (Mo. banc 1985), holding that there are four elements to a negligent action: (1) A legal duty on the part of defendant and (2) a breach of that duty and (3) a proximate cause between the conduct and injury and (4) actual damage to claimant's personal property. Duty is the only element of negligence that is determined as a matter of law. See *Deuschle v. Jobe*, 30 S.W.3d 215 (Mo. App. 2000 at 218.

Missouri cases make it clear that the central issue in determining whether a defendant has a duty to an injured party is public policy. In *Hoover's Dairy, Inc. v. Mid-America Dairymen*, 700 S.W.2d 426 (Mo. banc 1985), the court stated:

> "The judicial determination of the existence of the duty rests on sound public policy as derived from a calculus of factors: among them, the social consensus that the interest is worthy of protection; the foreseeability of harm and the degree of certainty that the protected person suffered injury; moral blame society attaches to the conduct; the prevention of future harm; consideration of cost and ability to spread the risk of loss; the economic burden upon the actor in the community…". Id. at 432.

Recent cases in which the courts have recognized duties include *Millard v. Corrado*, 14 S.W.3d 42 (Mo. App. 1999), in holding that an on-call surgeon had a duty to promptly respond to emergency calls; and *Deuschle v. Jobe*, 30 S.W.3d 215 (Mo. App. 2000, holding that unmarried sexual partners have an obligation to notify the other if he or she has a sexual transmitted disease.

The case of *Lins v. Boeckler Lumber Company*, 299 S.W. 150 (Mo. App. 1927) is relevant. As discussed below, §270.010 RSMo. places a duty on owners of animals to restrain the animals within a fence. In the *Lins* case, however, the statute did not apply because of a county option and the issue was whether the owner of livestock had a common law duty to restrain livestock. In the *Lins* case the plaintiff was driving his vehicle at about 1:00 AM when a mule appeared in the road in front of him and there was a collision causing plaintiff's injury. The Court noted that there were a number of assignments of error but "the principal one, however, urged at great length by the defendant…is that there is no duty upon the owner of the domestic animal to restrain it from ranging on the public highway…". The Court found that there was a duty and in so holding stated:

> "It was reasonable to anticipate that a mule left to roam at will at a point so near a much traveled public highway would be liable to stray upon the road, and cause just such an accident as was caused in this case. At least, we are of the opinion that it was a question for the jury to pass upon…". Id. at 152.

This appeal, therefore, presents the issue of whether, as a matter of public policy, the railroad should be protected from responsibility if it negligently fails to

maintain its fences and a person is injured. Appellant believes that this issue must be considered in the context of public policy established by other statutes. For example, §270.010 RSMo. provides that the owner of an animal who escapes through a fence onto a public highway is liable for damages caused by the animal unless the owner can establish that the animal was outside of the enclosure through no fault of the owner. In other words, there is a presumption of fault on the part of the owner of the animal. See *King v. Furry*, 317 S.W.2d 690 (Mo. App. 1958). If this court holds that the railroad has no duty to maintain its fence to prevent animals from escaping onto the highway, we are left with the illogical result that there is a presumption of fault on the part of the owner of the escaping animal, but the party responsible for owning and maintaining the fence through which the animal escaped is protected from liability.

Section 389.650 RSMo. also addresses an important public policy consideration. That statute states in part as follows:

> "1. Every railroad corporation…operating any railroad in this state, shall erect and maintain lawful fences on the side of the road where the same passes through, along or adjoining enclosed or cultivated fields or unenclosed lands, with openings and gates therein…sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad…".

Defendant may argue that there are no Missouri cases in which a railroad has been held liable to an injured motorist who collided with livestock, however, there are

no cases excluding liability. To find a duty, it is not necessary to overrule any existing cases but merely apply the current law to the facts in the case at bar.

The judicial considerations to determine duty discussed in *Hoover's Dairy, Inc.*, supra, make it clear that public policy is not frozen in time but evolves to accommodate present circumstances. We now have high-speed divided highways, such as the highway involved in the case at bar, that run adjacent to railroads and adjacent to pasture lands. Should this Court protect the railroads from the negligence that allows livestock to escape through its right-of-way fences? Which public interest is more important – the interest of the public to travel safely on highways or easing the financial burden on the railroad of safely maintaining right-of-way fences? Appellant submits that the public policy consideration strongly favors protecting the traveling public and this Court should find that the defendant has a duty to the traveling public to adequately maintain its right-of-way fences.

III

THE COURT ERRED IN OVERRULING PLAINTIFF'S MOTION FOR LEAVE TO FILE ITS FOURTH AMENDED PETITION BECAUSE:

A. THE FOURTH AMENDED PETITION STATED A CAUSE OF ACTION AGAINST BURLINGTON NORTHERN RAILROAD FOR THE REASONS DISCUSSED IN THE FIRST AND SECOND POINTS RELIED ON AND

B. OVERRULING THE MOTION TO AMEND WAS A VIOLATION OF MISSOURI RULE 55.33 WHICH PROVIDES THAT LEAVE TO AMEND SHALL BE FREELY GRANTED AND A VIOLATION OF THE ESTABLISHED RULE THAT ORDINARILY LEAVE TO AMEND SHALL BE GRANTED AFTER A MOTION TO DISMISS IS SUSTAINED.

Leave to amend is ordinarily in the discretion of the court and the standard for review on this point relied on is whether the court abused is discretion in denying the motion to amend. See *Koeller vs. Ranger Insurance Compny*, 569 S.W.2d Mo. App. 1978).

The Trial Court based its dismissal on the lack of duty on the part of the railroad and the absence of proximate cause, however, defendant railroad argued in its Motion to Dismiss that Plaintiff's Petition failed to state a claim because it did not allege that the railroad had notice of the defective condition of the fence. Appellant believes that Count III was not defective in this regard, however, in

response to this concern Plaintiff made a Motion for Leave to File a Fourth Amended Petition which added the allegations in paragraph 3 as follows:

> "That the fence was rusty and brittle and that trees, shrubs and other vegetation were allowed to grow in the fence line and this created a distortion and stretching of the fence and a risk that limbs would fall on the fence and break the fence and the fence had been in this deteriorated condition for a long period of time and was not reasonably safe and the railroad knew or should have known of the deteriorated condition of the fence and that Defendant was negligent in failing to more closely inspect the fence and in failing to repair and maintain the fence. That the pasture was adjacent to US Highway 60, a heavily traveled highway, and that Defendant knew or should have known that a deteriorated fence, containing livestock, created an unreasonable risk of harm to the traveling public." (Supp. L.F. 6).

The Court denied Plaintiff's Motion to File Count III of the Fourth Amended Petition stating:

> "The court finds that the common law claim of negligence against Burlington Northern in the proposed fourth amended petition suffers from the same inability to demonstrate proximate cause as to the count previously dismissed by the court and is hereby rejected." (L.F. 44.)

For the reasons discussed in the first Point Relied On, Appellant believes that the Court erred in finding that the proposed Fourth Amended Petition was defective for failure to allege sufficient facts to show proximate cause. In fact, the Fourth Amended Petition plead the facts to show proximate cause in detail. The proposed petition alleged that the fence was rusty and brittle and that vegetation was allowed to grow in the fence line creating a distortion and stretching of the fence and that the fence had been in a deteriorated condition for a long period of

time and was not reasonably safe. The pasture that was enclosed by the fence was adjacent to US Highway 60, a heavily traveled divided highway. As the Court stated in *Lins v. Boeckeler Lumber Company*, supra, it was "reasonable to anticipate that a mule [in the case at bar three horses] left to roam at will at a point so near a much traveled public highway would be liable to stray upon the road and cause just such an accident as was caused in this case". Id. at 152.

Plaintiff complains of the denial of the Motion to File a Fourth Amended Petition. This might suggest that Plaintiff had repeated opportunities to file amended claims and state a cause of action but was unable to do so. This interpretation is incorrect. The First Amended Petition was filed six days after the original petition and before the original petition was served. (L.F. 4 and Tr. 40). The Second Amended Petition was filed to add an additional defendant, Bonnie Burks, who was the owner of the real estate where livestock were kept. Her existence was not known at the time suit was filed. (Tr. 41). The Third Amended Petition was the first petition that was subject to the Motion to Dismiss for failure to state a claim. Count III against the Defendant railroad was dismissed with prejudice and Plaintiff was denied the opportunity to file a Fourth Amended Petition.

Appellant believes the Third Amended Petition stated a cause of action and that the Fourth Amended Petition was unnecessary, however, if there was any deficiency in the Third Amended Petition, it was corrected in the Fourth Amended

Petition which stated the issues of causation with greater particularity. Appellant believes that the refusal to allow Plaintiff to amend its claim against Burlington Northern was an abuse of the Court's discretion and a violation of Missouri Civil Rule 67.06 which states:

> "On sustaining a motion to dismiss a claim . . . the court shall freely grant leave to amend and shall specify the time within which the amendment shall be made or amended pleading filed

See *Koller v. Ranger Insurance Company*, 569 S.W.2d 372 (Mo. App. 1978). The Court's ruling is also contrary to Missouri Rule 55.33 which states that the Court should freely grant leave to amend when justice so requires.

IV

THE COURT ERRED IN FAILING TO SUSTAIN PLAINTIFF'S VERBAL MOTION TO SUPPLEMENT THE MOTION FOR LEAVE TO AMEND BECAUSE:

A. THE MOTION ASKED TO ADD AN ALLEGATION THAT THE HORSE ESCAPED THROUGH THE BURLINGTON NORTHERN FENCE, WHICH WAS ALLEGED IN ALL OTHER COUNTS, BUT OMITTED IN COUNT III AGAINST BURLINGTON NORTHERN.

B. ALL PARTIES AGREED THAT THE ORAL MOTION SHOULD BE SUSTAINED AND THE COURT INDICATED AN INTENTION TO SUSTAIN THE ORAL MOTION.

Granting leave to amend is at the discretion of the court and the standard for review is whether the court abused is discretion in denying plaintiffs' motion to amend. See *Koller v. Ranger Insurance Company*, 569 S.W.2d 372 (Mo. App. 1978)

The Petition attached to Plaintiff's Motion for Leave to File a Fourth Amended Petition contained four counts. The allegations in all four counts were based upon the fact that the livestock that ended up on the highway escaped through a fence owned by Defendant Burlington Northern. Counts I, II and IV specifically allege that the livestock escaped through the fence and entered the highway, causing plaintiff's injury. Count III, which is the subject of the Motion

to Dismiss, implies that the horse escaped through a break in the Burlington Northern fence but does not specifically state that allegation.

The absence of this allegation was not asserted as a defect by the railroad, however, to be safe, plaintiff's attorney made an oral motion to the court to make this allegation specific and to add to paragraph 22 of Count II the following language:

> "That on April 1, 1999, livestock escaped through a fence owned by Burlington Northern Railroad and that Plaintiff Floyd Smith (sic) collided with the livestock on the public highway causing damage to the plaintiff described below." (Tr. 8).

Near the end of the hearing on the Motion to Dismiss, plaintiff's attorney asked the court to rule on the oral motion to add the above language and the Court stated:

> "I didn't hear any objection to it and it looks appropriate to me. If I allow a fourth amended petition, I don't see anything prejudicial about making the one change by interlineation that's been requested, but you all didn't speak to that. So if anybody objects to that let me know now." (Tr. 44).

There was no objection made to this motion by any party.

Appellant believes that the Court should have sustained Plaintiff's oral Motion to Amend by interlineation and then considered whether the Petition, as amended, stated a claim. Appellant raises this technical point on appeal to allow this court to consider the amended petition in its entirety, including the additional language offered in the oral motion.

It would be inequitable to find that plaintiff's petition failed to state a claim because of the omission of the allegations offered in the oral motion. Since there were no objections to the oral motion and the court indicated the oral motion was appropriate, the appellant believes that Missouri Rule 55.33 required that the oral motion be sustained and that the amended petition should be considered in its entirety, including the allegations offered in the oral motion.

REQUEST FOR ORAL ARGUMENT

Comes now the appellant and hereby requests oral argument of the cause herein.

Respectfully submitted,

BUCHANAN & WILLIAMS, P.C.

_____

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ATTORNEY FOR APPELLANT

I hereby certify that a true and correct copy of the foregoing was deposited in the U.S. Mail, postage prepaid, to Joseph L. Johnson, Lathrop & Gage, L.C., P.O. Box 4288, Springfield, MO 65808-4288 on this _____ day of December 2001.

_____

Charles Buchanan