M E M O R A N D U M

TO: Kris A. Sanders, Esquire

FROM: National Legal Research Group, Inc.
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RE: Pennsylvania/Automobile Injury/Liability/Escaped Horse

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STATEMENT OF FACTS

The owner of a farm, at a time estimated to be after 10:30 p.m. and before 1 a.m., had his personal horse leave the farm premises through a "courtesy" gate that had been fully secured and inspected any number of times, including the day prior to the escape. The gate was secured in several ways that makes it a virtual certainty that the gate had to be intentionally opened and left open by person(s) unknown. This gate is in a remote section of the property, and, though it is inspected several times each week, the particular day of the accident it was not inspected. This particular property is not near any residential dwellings and abuts a neighbor's woods. The neighbor has made a path through a lengthy section of the woods for the neighbor's own convenience in maintaining his property and fence lines. Apparently, the horse passed through this gate late at night, whether by outside agency or by the horse's own volition being unknown, and traveled a mile through the woods, likely down a mowed path, then crossed several residential lawns in a semirural area, and then entered onto a highway, at which time the horse was struck by a motor vehicle, resulting in the loss of life of a passenger in the motor vehicle.

QUESTIONS PRESENTED

1. Under Pennsylvania law, what protections are available by farm or agricultural law to owners of livestock on the issue of escaped animals when there is no notice to the farmer of the disappearance of the animal which left the premises? Does daytime or nighttime have any influence on this conclusion?

2. Presuming that it is established to a reasonable degree of certainty that the gate could not have been opened but for human interference (thereby intentionally opened and

left open) and presuming that no person acknowledges opening the gate (the farmer certainly did not open the gate), how does the intervention of an unknown or outside agency reduce or eliminate the possible liability of the farmer?

DISCUSSION OF AUTHORITY

I. Under Pennsylvania Law, What Protections Are Available by Farm or Agricultural Law to Owners of Livestock on the Issue of Escaped Animals When There Is No Notice to the Farmer of the Disappearance of the Animal Which Left the Premises? Does Daytime or Nighttime Have Any Influence on this Conclusion?

A. General Principles

Research revealed no Pennsylvania statute directly on point. There is a statute that states: "[N]o stallion,[1] bull, boar, ram, or jack, shall be permitted to run at large on the public highways of this commonwealth." 3 P.S. § 584 (1995). There are no case annotations under this statute, but even if the horse in the present case was a stallion it is doubtful that the farmer would be strictly liable or liable under the doctrine of negligence per se as a result of a violation of this statute. In a case construing a statute that required confinement of dogs, the court noted that if a dog owner exercises due care he may not be deemed negligent:

> In Miller, [*v. Hurst*, 302 Pa. Super. 235, 448 A.2d 614 (1982)], this Court adopted the statutory requirement of the Dog Law, *supra*, as the standard to be applied in determining whether a dog owner has exercised due care in the supervision of his dog; the Court held that an unexcused violation of the Dog Law is negligence *per se*. The *Miller* Court thus abrogated the common law "one free bite" rule, under which an animal was required to be restrained only after its behavior evidenced viciousness. *See Freeman v. Terzya*, 229 Pa.Super. 254, 323 A.2d 186 (1974). While not specifying what nature of excuse would escape *per se* treatment, the *Miller* court added in a footnote that

[1]A stallion is a male horse that has not been neutered. A gelding is a male horse that has been neutered. A mare is a female horse. Webster's Ninth New Collegiate Dictionary (1983).

> a dog owner may always show that the dog escaped despite the exercise of due care and that in such cases negligence would not be found. The Court explicitly rejected imposing absolute liability upon the dog owner:
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> > "We find it improvident and unnecessary to effect such a monumental change without legislative action."
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> *Miller*, 302 Pa.Super. at 244, 448 A.2d at 618-619.

Villaume v. Kaufman, 379 Pa. Super. 561, 550 A.2d 793, 795 (1988).

The on-point Pennsylvania cases clearly reveal that an owner's liability depends upon whether he has been negligent in allowing his domestic animal[2] to escape. The two key Pennsylvania cases are *Tassoni v. LeBoutillier*, 130 Pa. Super. 303, 196 A. 534 (1938), and *Bender v. Welsh*, 344 Pa. 392, 25 A.2d 182 (1942). In *Tassoni*, an unattended horse dashed onto a highway shortly after midnight and collided with an automobile driven by the plaintiff. The plaintiff alleged that the defendant negligently failed to keep his horse off the highway. 196 A. at 536. Although the *Tassoni* court reversed a compulsory nonsuit, the court clearly stated that an owner's liability must be predicated upon some negligent act or omission. The court stated:

> Defendant would not be "responsible for injuries caused by his [horse] unless he himself was guilty of negligence in his manner of controlling or not controlling that property." Andrews v. Smith et ux., 324 Pa. 455, at page 458, 188 A. 146, at page 148.
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> In Potter Title & Trust Co. v. Oswald & Hess Co., 322 Pa. 81, at page 84, 185 A. 231, at page 232, Mr. Justice Schaffer, speaking for our Supreme Court, said: "Of course, there is more or less danger from cattle which are at

[2]A horse is a domestic animal. *Gallick v. Barto*, 828 F. Supp. 1168, 1174 (M.D. Pa. 1993); Restatement (Second) of Torts § 506 (1976). It is assumed that the horse in question was not abnormally dangerous and had no significant history of viciousness or escapes.

> large in public streets, but, unless their presence is due to some negligent act, the owner of them cannot be held responsible for their conduct."
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> Although these principles are applicable to the instant case, we think the facts developed by plaintiff required defendant to go forward with the evidence.
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> Defendant's animal was roaming the public highways at midnight, endangering the traveling public. It had wandered at least a half mile from defendant's farm and dashed onto a concrete public highway from another public highway. It was unattended. No one appeared in search of it, and the carcass had to be removed from the concrete roadway by travelers using that highway. The animal was wrongly in the highway (see North Pennsylvania Railroad Co. v. Rehman, 49 Pa. 101, 108, 88 Am.Dec.491); it was where it had no right to be, while plaintiff was lawfully on the highway attending to his own business (see Goodman v. Gay, 15 Pa. 188, 194, 53 Am. Dec.589). . . .
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> It was defendant's duty to look after his property and to use due care to control it, otherwise he was liable for the damage caused by it. "The owner of any kind of animal is supposed to have knowledge of its generic disposition to stray and liability to take fright; and if its size and speed are such as to make it dangerous under such circumstances, the owner is bound to ordinary care to keep it from straying, and if he does not, he will be liable for all injuries committed by it while straying, which he ought, in prudence, to have foreseen as likely to occur." Hanover, Law of Horses, p. 367, § 709. The unexplained facts were sufficient to require submission of the case to the jury on the question whether defendant was guilty of negligence in the manner of controlling or not controlling his horse. It was not necessary to prove defendant's negligence by positive evidence; such negligence may be shown by proof of circumstances from which the jury is permitted to infer negligence on the part of defendant.

Id.

In *Bender v. Welsh*, a horse suddenly emerged from a shadow and was struck by an automobile at about 11 p.m. on a clear, dry night. The horse, which was usually kept in a pasture adjacent to the road, had been seen running loose on the road on one prior occasion. 25 A.2d at 183. The pasture was surrounded by a wire and picket fence. Shortly after the accident, one of the horizontal bars of the picket fence was found pushed out, and hoofprints

were seen on the ground. *Id*. There was no evidence that the fence had rusty nails or that it was otherwise defective. *Id*.

The court noted that, traditionally, owners were not obligated to keep their livestock off public roads. However, the court indicated that the modern rule is reflected in the Restatement:

> The widespread use of the motor vehicle has changed the situation, however, and the rule adapted to present-day conditions is that stated in the Restatement of Torts, § 518 (1); "* * * one who possesses or harbors a domestic animal, which he does not have reason to know to be abnormally dangerous but which is likely to do harm unless controlled, is subject to liability for harm done by such animal if, but only if, (a) he fails to exercise reasonable care to confine or otherwise control it, and (b) the harm is of a sort which it is normal for animals of its class to do".
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> In determining whether the instant case comes within the rule of the Restatement, we can safely say without discussion that the second requisite has been satisfied; an unattended horse on the highway at night is in obvious danger of becoming involved in a collision with an automobile which is being carefully driven.

Id. at 184.[3]

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[3]The current version of the rule is as follows:

> Liability for Harm Done by Domestic Animals That Are Not Abnormally Dangerous
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> Except for animal trespass, one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if,
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> (a) he intentionally causes the animal to do the harm, or
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> (b) he is negligent in failing to prevent the harm.

Restatement § 518.

The court then observed that a plaintiff creates a prima facie case for the jury by showing that a horse is found unattended on a highway. Affirming the trial court's denial of the defendant's motion for judgment n.o.v., the court stated:

> The question is whether plaintiffs have presented sufficient evidence to justify the jury in finding that defendants were negligent, the burden of proof being on plaintiffs. Negligence is not to be presumed from the mere happening of an accident. Rennie v. Schepps, 297 Pa. 39, 41, 146 A. 261. But if the thing which causes the injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of events would not happen if defendant, who has the management, uses proper care, the burden is then placed on defendant, not to explain the accident, but to show that he used due care. Maltz v. Carter, 311 Pa. 550, 166 A. 852; Knox v. Simmerman, 301 Pa. 1, 151 A. 678; Folk v. Schaeffer, 186 Pa. 253, 40 A. 401; Devereaux v. Caldin, 127 Pa.Super. 595, 193 A. 372; Young v. Yellow Cab Co., 118 Pa.Super. 495, 180 A. 63; Hamill v. Philadelphia Rapid Transit Co., 98 Pa.Super. 242; Latella v. Breyer Ice Cream Co., 87 Pa.Super. 325; Helfrich v. Gurnari, 78 Pa.Super. 449. If he does not show this to the jury's satisfaction, it may infer that he was negligent. . . . [H]orses which are properly confined ordinarily do not escape. Hence the presence of an unattended horse on the highway is sufficient evidence to allow the jury to infer negligence on the part of those whose duty it was to restrain him, and this has been held in a number of cases, including Tassoni v. LeBoutillier, 130 Pa.Super. 303, 196 A. 534; Flesch v. Schlue, 194 Iowa 1200, 191 N.W. 63; Dickson v. McCoy, 39 N.Y. 400; Doherty v. Sweetser, 82 Hun 556, 31 N.Y.S. 649; Kenney v. Antonetti, 211 Cal. 336, 295 P. 341, and Anderson v. I.M. Jameson Corporation, 7 Cal.2d 60, 59 P.2d 962. The reason justifying the rule is aptly stated in Kenney v. Antonetti, Supra, 211 Cal. at page 340, 295 P. at page 342: "Under any but exceptional circumstances, the exercise of ordinary care will serve to keep unattended animals in their proper inclosures. In these days of rapid automobile transportation, the extreme hazard to drivers and passengers of animals straying unattended on the roads at night cannot be overestimated. The driver is placed in a well-nigh helpless position because of the tendency of an animal to spring out of the darkness in front of a car when blinded or hypnotized by its headlights. Against this contingency, drivers should be protected, by having our roads clear of such obstructions, and every owner of live stock should make an earnest endeavor to so control their movements with due care that the lives of others may not be thereby endangered."

Id.; *cf. Cohen v. Rodenbaugh*, 162 F. Supp. 748 (E.D. Pa. 1957), *aff'd*, 255 F.2d 105 (3d Cir. 1958) (owner of horse not liable to plaintiff kicked by horse in absence of knowledge by owner of horse's vicious disposition or kicking habit); *Burwell v. Crist*, 251 F. Supp. 686, 688 (M.D. Pa. 1966), *rev'd on other grounds*, 373 F.2d 78 (3d Cir. 1967) (same); *Potter Title & Trust Co. v. Oswald & Hess Co.*, 322 Pa. 81, 185 A. 231 (1936) (mere fact that animal runs away does not establish owner's negligence); *Gallick v. Barto*, 828 F. Supp. at 1168, 1175 (M.D. Pa. 1993) (landlords liable for injury caused when ferret bit child, if landlords were negligent).

B. Relevance of Time of Accident

Research revealed no Pennsylvania authority that would lessen a farmer's duty or potential liability based on the timing (daytime or nighttime) of an accident that is caused by an escaped horse.[4] The *Bender* court observed that "an unattended horse on the highway at night is in obvious danger of becoming involved in a collision." *Bender v. Welsh*, 25 A.2d at 184. The *Bender* court did not state that an owner's duty is greater at night, although the *Bender* court cited a California case in which the California Supreme Court stated:

> How the cow of appellant involved in this accident arrived on the road was not explained, although one witness testified that her tracks indicated that she had gotten into the territory west of the highway and thence wandered out through an open gate. However, it was not incumbent upon plaintiffs to prove how that particular animal reached the road. The evidence warranted the inference that the animal had strayed from the rest of the herd, and the jury was warranted in believing that appellant had failed to show that it exercised that ordinary care and caution in the management and control of its cattle which would have prevented the straying. We venture to say that in scarcely

[4]Of course, it is possible that the horse in question escaped during daylight hours but did not venture onto the highway until after dark.

> a case of this character could a plaintiff prove directly by what particular act of negligence any one animal had been permitted to stray to the road. But the presence of the cow on the highway in violation of the statute made a prima facie case and placed upon appellant the burden of proceeding and producing evidence to rebut said prima facie case. Under any but exceptional circumstances, the exercise of ordinary care and safeguards will serve to keep unattended animals off the roads. Kenney v. Antonetti, supra. In this case there was sufficient evidence to support the implied finding of the jury that appellant had failed to take proper precautions to prevent straying on the road at night. *The need of caution is greater at night than in the daytime because the darkness increases not only the difficulty of watching the cattle but the danger to the motorist as well*. Olden v. Babicora Dev. Co., 107 Cal.App. 399, 290 P. 1062. "In these days of rapid automobile transportation, the extreme hazard to drivers and passengers of animals straying unattended on the roads at night cannot be overestimated. The driver is placed in a well-nigh helpless position because of the tendency of an animal to spring out of the darkness in front of a car when blinded or hypnotized by its headlights. Against this contingency, drivers should be protected, by having our roads clear of such obstructions, and every owner of livestock should make an earnest endeavor to so control their movements with due care that the lives of others may not be thereby endangered." Kenney v. Antonetti, supra, 211 Cal. 336, at page 340, 295 P. 341, 342.

Anderson v. I.M. Jamison Corp., 59 P.2d 962, 967-68 (Cal. 1936) (emphasis added).

Illustration k under Restatement § 518 states in part:

> There may, however, be circumstances under which it will be negligent to permit an animal to run at large, even though it is of a kind that customarily is allowed to do so and under other circumstances there would be no negligence. Thus if a horse is turned loose in a field that abuts upon a public highway, and there is no fence to keep him off the highway, it may reasonably be anticipated that he will wander onto it, and that, particularly in the night time, his presence there may constitute an unreasonable danger to traffic. In these cases there may be liability for negligence upon the same basis as in other negligence cases.

In short, it does not appear that an owner's duty or potential liability is any lower, and it may well be higher, when an accident occurs at night. Theoretically, counsel could argue that it is less foreseeable to the farmer that an escape will occur at night if the horse normally

sleeps at night. Of course, plaintiff's counsel can argue that the motorist was not comparatively negligent because it was harder to see the horse at night.

II. Presuming That It Is Established to a Reasonable Degree of Certainty That the Gate Could Not Have Been Opened but for Human Interference (Thereby Intentionally Opened and Left Open) and Presuming That No Person Acknowledges Opening the Gate (the Farmer Certainly Did Not Open the Gate), How Does the Intervention of an Unknown or Outside Agency Reduce or Eliminate the Possible Liability of the Farmer?

The same general background analysis set forth in I (A) above applies to this question as well. That is, an owner's liability depends upon negligence, but a plaintiff can usually establish a prima facie case of negligence simply by showing that a horse escaped onto a highway. The key to the farmer's defense will be to introduce evidence to show that due care was exercised. Such evidence could include the fact that there were frequent inspections and that the gate was constructed so that it could only be opened by intentional human conduct. The farmer should show that the gate was closed at the time it was last inspected, so that it is clear that the farmer did not inadvertently leave the gate open. It would also be helpful to show that this horse had no history of escaping generally, and no history of escaping through the gate in question.[5]

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[5]If the horse had a history of escaping, it will be harder to prove that the farmer exercised due care. A more secure gate (perhaps chained and locked) might be required in that event. *Cf. Andrews v. Smith*, 324 Pa. 455, 188 A. 146, 148 (1936) (owner of vicious animal may be liable if he knows of animal's nature). Such a horse might be considered "abnormally dangerous" for purposes of Restatement § 510, which provides:

> Effect of Contributing Actions of Third Persons, Animals and Forces of Nature
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> The possessor of a wild animal or an abnormally dangerous domestic animal is subject to strict liability for the resulting harm, although it would not have occurred but for the unexpectable

The Pennsylvania Supreme Court in *Bender* observed that "horses which are properly confined ordinarily do not escape." 25 A.2d at 184. This language suggests that the farmer was not negligent if he had a reasonably secure gate that could only be opened by intentional human conduct. Since the gate was in an area isolated from the public, the farmer could argue that it was not reasonably foreseeable that some third party would intentionally leave the gate open. The *Bender* court cited an Iowa case that is instructive. *Id*. (citing *Flesch v. Schlue*, 191 N.W. 63 (Iowa 1922)).

In the *Flesch* case, an automobile collided with the defendant's horse, which was loose on a highway. The defendant's son testified that shortly before the accident he had put the horse in the barn, tied him securely there, and closed all the doors. However, a gate outside the barn was left open. Therefore the horse "could not have escaped upon the highway except by the unauthorized act of some third person." 191 N.W. at 63. The court suggested that if the jury believed the defendant's evidence it should have ruled for the defendant.

> The burden of proving negligence was on the plaintiff. The defendant's burden was negative. The plaintiff proved that the horse was upon the highway, and that the defendant's gate was open. The circumstances permitted the inference that the horse had passed out upon the highway from the yard through the gate. If the jury had believed the testimony for the defendant that the horse had been securely tied and locked in the barn, a verdict must have been returned for the defendant. The credibility of the testimony of the defendant's son was for the jury. The jury had a right to believe from all the circumstances that the horse

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(a) innocent, negligent or reckless conduct of a third person, or

(b) action of another animal, or

(c) operation of a force of nature.

> had been left in the yard rather than in the barn. To that extent the credibility of the testimony for the defendant failed.

Id. at 64.

Research revealed no Pennsylvania case involving an escaped horse in which the issue of intentional misconduct by a third party was considered. However, counsel could refer to several "stolen automobile" cases as being analogous. In several cases, Pennsylvania courts have refused to hold vehicle owners or bailees liable for negligent driving by a third party who steals the vehicle. In such cases, the courts hold that the owner or bailee could not reasonably foresee this chain of events. For example, in *Liney v. Chestnut Motors, Inc.*, 421 Pa. 26, 218 A.2d 336 (1966), a garage owner's employees left a vehicle double-parked in a street with the key in the ignition. Three hours later, a stranger stole the car, drove it carelessly, and struck the plaintiff pedestrian. Affirming dismissal of the plaintiff's claim, the court stated:

> Assuming that defendant's employees were negligent in permitting the automobile to remain outside in the street under the circumstances described, it is clear that the defendant could not have anticipated and foreseen that this carelessness of its employees would result in the harm the plaintiff suffered. See, Rapczynski v. W.T. Cowan, Inc., 138 Pa.Super. 392, 10 A.2d 810 (1940), and Roscovich v. Parkway Baking Co., 107 Pa.Super. 493, 163 A. 915 (1933). In other words, the defendant violated no duty owed to the plaintiff. This being so, the plaintiff was not harmed by the defendant's negligence. See, Dahlstrom v. Shrum, 368 Pa. 423, 84 A.2d 307 (1951), and Zilka v. Sanctis Construction, Inc., 409 Pa. 396, 186 A.2d 897 (1962). Assuming also that the defendant should have foreseen the likelihood of the theft of the automobile, nothing existed in the present case to put it on notice that the thief would be an incompetent or careless driver. Under the circumstances, the thief's careless operation of the automobile was a superseding cause of the injury suffered, and defendant's negligence, if such existed, only a remote cause thereof upon which no action would lie. See, Restatement, Torts, (Second) §§ 448, 449, and § 302 B, Illustration 2 (1965); Prosser, Law of Torts (2d ed. 1941), at 140-41-42; DeLuca v. Manchester Ldry, & Dry Cl. Co., 380 Pa. 484,

> 112 A.2d 372 (1955); Kite v. Jones, 389 Pa. 339, 132 A.2d 683 (1957); and, Green v. Independent Oil Co., 414 Pa. 477, 201 A.2d 207 (1964).
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> It is true that the question of proximate cause is generally for the jury. However, if the relevant facts are not in dispute and the remoteness of the causal connection between the defendant's negligence and the plaintiff's injury clearly appears, the question becomes one of the law: Klimczak v. 7-Up Bottling Co. of Phila., 385 Pa. 287, 122 A.2d 707 (1956), and Green v. Independent Oil Co., supra.

218 A.2d at 337-38; *see also*, *Matos v. Rivera*, 436 Pa. Super. 509, 648 A.2d 337, 340 (1994); *Jamison v. City of Philadelphia*, 355 Pa. Super. 376, 513 A.2d 479, 481-82 (1986).