

NO. COA14-459

NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

GLENN R. WILMOTH,

Plaintiff,

v.

Surry County
No. 11 CVS 533

GILBERT W. HEMRIC and
VAN W. HEMRIC,

Defendants.

Appeal by defendants from judgment entered 18 December 2013
by Judge A. Robinson Hassell in Surry County Superior Court.
Heard in the Court of Appeals 5 November 2014.

*Willardson & Lipscomb, L.L.P., by William F. Lipscomb, for
defendants-appellants.*

Jay Vannoy and Franklin D. Smith, for plaintiff-appellee.

ELMORE, Judge.

On 21 November 2013, a jury found that plaintiff was
injured as a result of defendants' negligence. Defendants
appeal from the judgment that resulted from the jury verdict
and, in relevant part, challenge the trial court's denial of
their motion for a directed verdict. After careful

consideration, we reverse the trial court's denial of that motion and vacate the judgment.

I. Facts

On 9 July 2008, Glenn Wilmoth (plaintiff) observed two cows wearing numbered purple identification tags in his sister's garden between 4:30 p.m. and 5:30 p.m. Plaintiff moved the cows out of his sister's garden to a nearby wooded area. Later that evening, between 8:30 p.m. and 8:45 p.m., plaintiff went back to his sister's house. As he was leaving, he saw the same two cows at the edge of the driveway. Plaintiff went back inside the house to retrieve his brother-in-law. Plaintiff and his brother-in-law exited the house only to find one cow standing in the driveway. Plaintiff walked around the premises for the purpose of locating the other cow, at which point that cow charged and struck him, resulting in severe injuries to his back and legs.

Plaintiff's sister transported plaintiff to the hospital, and he stayed there overnight. Approximately five days after plaintiff left the hospital, he called Van Hemric (defendant Van Hemric) after discovering that he might own the cows. Defendant Van Hemric did not answer the phone so plaintiff left a voicemail.

On or about 20 July 2008, approximately eleven days after plaintiff sustained his injuries, a vehicle struck a cow less than a mile from plaintiff's home on CC Camp Road. Plaintiff went to the accident scene and was able to identify the cow, based on the purple tag, as the same one that injured him. Plaintiff called defendant Van Hemric a day later and was able to speak with him on the phone. Plaintiff told defendant Van Hemric about the vehicle collision and the prior event that led to his injuries.

On 25 April 2011, plaintiff filed a complaint alleging, in relevant part, that defendants failed to act "as . . . ordinary, reasonable, and prudent person[s] would have done upon learning the cattle and/or livestock had roamed from the pasture."

At trial, and after plaintiff presented all of his evidence, defendants made a motion for a directed verdict, which was denied by the trial court. Defendants thereafter presented evidence, and Larry Chappell testified that defendants employed him during the summer of 2008 to check cattle. The two particular cows subject to this action were kept in the Kirk Pasture. Among his duties, Chappell visited the Kirk pasture twice a week to check the fences, count the cows, and record his results in a book (the book). At some point in July 2008 he

discovered that two cows were missing, but Chappell could not recall when in July this had occurred. He testified that he recorded the exact date in the book but threw it away after he stopped working in the Kirk Pasture and well before he had knowledge of plaintiff's injuries or plaintiff's complaint.

A day after noticing that the two cows were missing, Chappell reported that information to defendant Van Hemrick. Defendant Van Hemrick testified that Chappell notified him about the missing cows before 21 July 2008, but he could not recall the specific day.

At the close of all the evidence, defendants renewed, and the trial court once again denied, their motion for a directed verdict. The jury found that plaintiff was injured as a result of defendants' negligence. Pursuant to the jury's determination of damages, the trial court ordered that plaintiff recover \$350,000 from defendants with interest at the legal rate of eight percent per annum. Defendants moved for a judgment notwithstanding the verdict, which the trial court denied.

II. Analysis

Defendants argue that the trial court erred in denying their motion for a directed verdict because plaintiff failed to

present sufficient evidence to establish that defendants' negligence caused plaintiff's injuries. We agree.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

Generally, a negligence recovery requires proof of a legal obligation, a breach of that obligation, proximate cause, and actual damages. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48, *aff'd*, 360 N.C. 164, 622 S.E.2d 494 (2005). Within the specific context of an animal owner's liability for negligence:

The liability of the owner of animals for permitting them to escape upon public highways, in case they do damage to travelers or others lawfully thereon, rests upon the question whether the keeper is guilty of negligence in permitting them to escape. In such case the same rule in regard to what is and what is not negligence obtains as ordinarily in other situations. It is the legal duty of a person having charge of animals to exercise ordinary care and the foresight of a prudent person in keeping them in restraint.

Gardner v. Black, 217 N.C. 573, 576, 9 S.E.2d 10, 11 (1940).

Importantly, a plaintiff must present evidence sufficient to indicate that defendant's animals "were at large with his knowledge and consent, or at his will, or that their escape was due to any negligence on his part." *Id.* at 577, 9 S.E.2d at 12.

Here, plaintiff did not offer evidence sufficient to show that the cow escaped due to defendants' negligence (failure to maintain an adequate fence, leaving a gate open, counting the cows too infrequently, etc.). Rather, plaintiff's theory of liability at trial was that defendants acted negligently based upon their failure to sufficiently look for the cows once they learned or should have learned that the cows had escaped.

Thus, the dispositive issue is whether plaintiff presented sufficient evidence for the jury to infer that before the time of plaintiff's injury, defendants knew or should have known that

the cows were missing. This knowledge was a necessary prerequisite to establish defendants' duty to engage in reasonable measures to locate the cows. See *id.*

The evidence taken in the light most favorable to plaintiff shows the following: Chappell checked the pasture on a Tuesday and Thursday each week and remembered a time in July 2008 when he realized that two cows were missing. A day later, Chappell reported that information to defendants. Defendant Van Hemric recalled Chappell notifying him about the missing cows before having a phone conversation with plaintiff on 21 July 2008, which was twelve days after plaintiff sustained his injuries. However, neither defendants nor Chappell recalled the exact day in July that Chappell discovered the cows were missing. Thus, whether defendants' alleged negligent conduct (their failure to properly search for the cows) occurred before or after plaintiff's injury is a matter of pure speculation.

We also note that although plaintiff saw the two cows in his sister's garden on 9 July 2008 between 4:30 p.m. and 5:30 p.m., and again at the time of his injury between 8:30 p.m. and 8:45 p.m., such evidence by itself only shows that the cows escaped, not that defendants knew or should have known that the cows escaped, especially because Chappell conducted his cow-

count on Tuesdays and Thursdays, and 9 July 2008 was on a Wednesday.

We therefore hold that no sufficient evidence at trial showed that defendants had violated a duty of care to search for the cows at the time of plaintiff's injury. Plaintiff failed to establish that defendants knew or should have known that the cows had escaped before the time of his injury. See *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 259, 181 S.E.2d 173, 176 (1971) ("Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion . . . for a directed verdict."). Accordingly, the trial court erred by denying defendants' motion for a directed verdict.

III. Conclusion

In sum, we reverse the trial court's denial of defendants' motion for a directed verdict and vacate the trial court's judgment.

Reversed and vacated.

Judges ERVIN and DAVIS concur.