Missouri Court of Appeals

Southern District

Division One

JANIE L. GROMER,	)	
	)	
Plaintiff - Respondent,	)	
	)	
vs.	)	No. SD29942
	)	
HUBERT MATCHETT, SR.,	)	Opinion filed:
	)	September 7, 2010
Defendant - Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF BUTLER COUNTY

Honorable Mark L. Richardson, Circuit Judge

REVERSED AND REMANDED

Hubert Matchett, Sr. ("Defendant") appeals a $12,250.00 judgment entered against him in favor of Janie L. Gromer ("Plaintiff) based on Missouri's Stock Law, section 270.010[1] ("the Stock Law"). Plaintiff was injured when a horse owned by John Barker escaped from Defendant's farm through an open gate and was struck by a vehicle which then crashed into Plaintiff's vehicle. In a single point relied on, Defendant alleges the trial court committed reversible error by finding the Stock Law applicable to

[1] Unless otherwise indicated, all statutory references are to RSMo 2000.

Defendant. Because Defendant did not own the escaped horse, and the plain language of the Stock Law makes it applicable only to owners of escaped livestock, we reverse the judgment of the trial court and remand the matter for additional proceedings on Plaintiff's alternative theory of recovery.

Factual and Procedural Background

When Mr. Barker's horse escaped from Defendant's farm, it entered the public highway. Walter Willeford, who was driving to work, struck the horse and then collided with Plaintiff's vehicle, which was approaching from the opposite direction. Plaintiff's petition asserted claims against Mr. Willeford, Mr. Barker, and Defendant. Plaintiff settled her claims against Mr. Willeford and Mr. Barker prior to trial. Plaintiff's claims against Defendant were that Defendant was negligent and/or reckless and that he "was the owner of real property upon which the horse owned or possessed by [Mr. Barker] was being boarded prior to the collision."

During the instructions conference held prior to closing arguments and the submission of the case to the jury, Defendant also lodged an objection to jury instruction No. 7, which was ultimately given to the jury and read:

> In your verdict you must assess a percentage of fault[2] to [Defendant] if you believe:
>
> First, [Defendant] was in possession of the horse for the purpose of boarding; and
>
> Second, On September 11, 2001 at 5:30 a.m., the horse was outside of the Defendant's boarding enclosure and was on the public highway; and
>
> Third, a vehicle being operated on the public highway collided with the horse and then the vehicle collided with [Plaintiff's] vehicle, and

[2] Although Defendant was the only remaining defendant at the time of trial, Plaintiff's comparative fault was also at issue.

> Fourth, the collision directly caused or directly contributed to cause any damage [Plaintiff] may have sustained.

Defendant's objection to the instruction was "it's our position [that] the Stock Law only applies to owners and not possessors."

Analysis

"When reviewing the propriety of an instruction, we must review the evidence in the light most favorable to the submission of the instruction, and a party is entitled to an instruction upon any theory supported by the evidence. A verdict directing instruction is erroneous if any required finding is contrary to law, or is not supported by the evidence." ***Sheehan v. Northwestern Mut. Life Ins. Co.***, 103 S.W.3d 121, 127 (Mo. App. E.D. 2002) (citations omitted). "The interpretation of a statute and whether it applies to a given set of facts are questions of law, which we review de novo." ***Hecht v. Hecht***, 289 S.W.3d 647, 649 (Mo. App. E.D. 2009) (citing ***Boggs ex rel. Boggs v. Lay***, 164 S.W.3d 4, 23 (Mo. App. E.D. 2005)).

When interpreting a statute,

> our primary goal is to determine "the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning." *Lonergan v. May*, 53 S.W.3d 122, 126 (Mo.App. W.D.2001) (quoting *Farmers' & Laborers' Co-op. Ins. Ass'n v. Dir. of Revenue*, 742 S.W.2d 141, 145 (Mo. banc 1987)). Where the language of the statute is clear and unambiguous, there is no room for construction. *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988). "To determine whether a statute is clear and unambiguous, this court looks to whether the language is plain and clear to a person of ordinary intelligence." *Russell v. Mo. State Employees' Ret. Sys.*, 4 S.W.3d 554, 556 (Mo.App. W.D.1999). The ordinary meaning of a word is usually derived from the dictionary when a word used in a statute is not defined therein. *Preston v. State*, 33 S.W.3d 574, 578 (Mo.App. W.D.2000). "Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute." *Lonergan*, 53 S.W.3d at 126.

Long v. Interstate Ready-Mix, L.L.C., 83 S.W.3d 571, 576 (Mo. App. W.D. 2002).

The Stock Law has remained unchanged since it was enacted in 1945 and reads as follows:

> It shall be unlawful for the *owner* of any animal or animals of the species of *horse*, mule, ass, cattle, swine, sheep or goat, in this state, to permit the same to run at large outside the enclosure of the *owner* of such stock, and if any of the species of domestic animals aforesaid be found running at large, outside the enclosure of the *owner*, it shall be lawful for any person, and it is hereby made the duty of the sheriff or other officer having police powers, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith, and such person or officer shall, within three days, give notice thereof to the *owner*, if known, in writing, stating therein the amount of compensation for feeding and keeping such animal or animals and damages claimed, and thereupon the *owner* shall pay the person, or officer, taking up such animal or animals a reasonable compensation for the taking up, keeping and feeding such animal, or animals, and shall also pay all persons damaged by reason of such animals running at large, the actual damages sustained by him or them; provided, that said *owner* shall not be responsible for any accident on a public road or highway if he establishes the fact that the said animal or animals were outside the enclosure through no fault or negligence of the *owner*. If the *owner* of such stock be not known, or if notified and fails to make compensation for the taking up, feeding and keeping of animals taken up under the provisions of this chapter, the same shall be deemed strays, and shall be dealt with in the same manner as required by law with respect to such property as strays, under the stray law. Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal, which damages may be sued for and recovered in any court of competent jurisdiction.

Section 270.010 (emphasis added).

If the Stock Law applied to Defendant, Plaintiff could properly have submitted her case and recovered damages without having to prove that the horse escaped due to Defendant's negligence because the Stock Law "permits the inference of negligence from

the fact the animal was loose on the road." ***Cox v. Moore***, 394 S.W.2d 65, 68 (Mo. App. Spfld.D. 1965).

Although the language of the Stock Law refers only to owners of escaped livestock, Plaintiff argues that previous cases have interpreted its provisions to apply to both owners and possessors of livestock, citing, among others, ***King v. Furry***, 317 S.W.2d 690 (Mo. App. St.L.D. 1958), ***Keefer v. Hartzler***, 351 S.W.2d 479 (Mo. App. K.C.D. 1961), and ***Jones v. St. Charles Cnty.***, 181 S.W.3d 197 (Mo. App. E.D. 2005). An examination of the cases cited in Plaintiff's brief reveals that while several state that possessors of livestock are subject to the Stock Law, none were actually decided on the ground that the Stock Law applies to non-owner possessors of livestock.

In ***King***, one of the earliest cases, the three defendants in the case were partners who ran a stock auction. 317 S.W.3d at 692. Two cows escaped from the defendants' pens and got onto the public highway where plaintiff ran into them. ***Id***. at 691. In reviewing a jury instruction submitted in reliance on the Stock Law, the reviewing court approved language that included the phrase that the animal "with which plaintiff's automobile collided was the property of *or in possession* of the defendants[.]" ***Id***. at 694 (emphasis added). Although one of the defendants testified at trial that he was the only owner of the cattle that were struck by the plaintiff, all three defendants had admitted in their answer to the plaintiff's petition that the defendants (plural) kept in the barn and stock pens cattle belonging to the defendants (plural). ***Id***. at 695. The court noted this admission and ultimately concluded that "[u]nder the evidence in this case plaintiff collided with cattle belonging to defendants, which cattle were loose on the public

highway." ***Id***. at 696. Thus, all three defendants were found to be owners, not mere possessors, of the escaped cattle.

In ***Keefer***, the plaintiff was injured when "her car struck a red hog owned by and in possession of defendant, who resided nearby." 351 S.W.2d at 480. After quoting what was then (and remains) the language of section 270.010, the court stated:

> The essential elements of plaintiff's case include proof as to the time and place of the accident, ownership *or possession* of the animal by defendant, that the Stock Law was in effect and proof of damage. Such proof and finding thereof entitles plaintiff to the verdict unless there is a further finding that the animal was outside the enclosure through no fault or negligence of the owner. In such cases it is the law and proper to instruct the jury that they may infer negligence on the part of defendant from the fact that the animal was on the highway at the time of the collision but such inference is not conclusive. It is further correct to charge the jury that the burden of proof by the greater weight of the credible evidence is upon defendant to prove that said animal was on the highway without any fault or negligence upon the part of the defendant or his agent.

Id. at 480-81 (emphasis added).

We see no reference in section 270.010 to the possession of an animal and mere possession was not at issue in ***Keefer*** because the defendant owned as well as possessed the hog. As a result, as in ***King***, *supra*, ***Keefer***'s reference to the "possession" of an animal as a basis for liability under the Stock Law was *dicta*. Unfortunately, this *dicta* would subsequently be repeated in ***Jones,*** *supra*.

In ***Jones***, a woman was killed when her automobile struck a horse on highway 40. 181 S.W.3d at 199. The horse was owned by a corporation and was being pastured on property owned by St. Charles County. ***Id***. The plaintiffs brought a wrongful death action in a two-count petition against both the corporate owner of the horse and the county. ***Id***. Count I alleged liability against each defendant based on the Stock Law and

count II alleged liability against each defendant based on general negligence. ***Id***. In reviewing the trial court's award of summary judgment in favor of the county on count I, the Eastern District stated, "As plaintiffs note, our courts have interpreted the Missouri Stock Law as applying to both owners and possessors of animals." ***Id***. at 200 (citing ***Keefer***, 351 S.W.2d at 480). However, in affirming the trial court's summary judgment in favor of the county on count I, the court did so by finding that the county "did not own or possess the horse involved in the collision." ***Jones***, 181 S.W.3d at 201. As a result, once again, the Eastern District's statement that the Stock Law is applicable to both owners and possessors was irrelevant to its resolution of the case.[3]

In the case at bar, there is no escaping the question of whether the Stock Law applies to non-owner possessors of livestock. Defendant did not own the horse but evidence was presented that he was in possession of it at the time it escaped and Plaintiff relied on the Stock Law's applicability to Defendant in submitting a verdict directing instruction that would allow her to recover damages from Defendant without the jury having to find that Defendant had been negligent.

In language that is plain and unambiguous, the Stock Law refers only to *owners* of livestock. Our General Assembly's use of the word "owner" in similar statutes demonstrates that it is capable of coupling ownership with other types of control when it chooses to do so. For example, section 267.585.1 refers to "[o]wners and operators of railroads, trucks, airplanes"; section 273.110.1 and section 267.603.1 refer to the "owner or custodian of livestock"; Section 267.120 refers to the "owner or owners or persons in

[3] We have also reviewed the other cases Plaintiff claims stand for the proposition that the Stock Law applies to possessors as well as owners of livestock. As in the three cases discussed above, none of the defendants in those cases were found to be liable under the Stock Law because they were merely in possession of the escaped livestock.

charge [of livestock]"; Finally, section 578.025.1 specifically differentiates between an owner and a possessor, referring to "Any person who: (1) Owns, possesses, keeps, or trains any dog."

The Stock Law does not define the word "owner." In the absence of such a definition, we give the word its ordinary meaning. ***Gash v. Lafayette Cnty.***, 245 S.W.3d 229, 232 (Mo. banc 2008). In doing so, we find helpful a Western District case which analyzed the plain meaning of the word "owner" in a workers' compensation statute which stated that "owner-operators" of trucks were not to be considered "employees."

> The dictionary defines "own" as, among other things, "to have or hold as property or appurtenance: have a rightful title to, whether legal or natural: possess"; "owner" as "one that owns: one that has the legal or rightful title whether the possessor or not"; and "ownership" as, among other things, "the state, relation, or fact of being an owner." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1612 (1993). "Own" is also defined as "to have power over: control." MERRIAM-WEBSTER ONLINE DICTIONARY. [footnote omitted] And Black's Law Dictionary defines "own" as "[t]o rightfully have or possess as property; to have legal title to"; "owner" as "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested"; and "ownership" as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." BLACK'S LAW DICTIONARY 1137-38 (8TH ED.2004).
>
> Based on these dictionary definitions and the language of the lease, Mr. Nunn did not own his truck. The lease states that unless Mr. Nunn exercises his right to purchase the truck, "at all times during the term of this Lease, no title to Tractor shall vest in Lessee." Although the lease certainly gives him power over the truck and a right to possession and use of it, if he does not exercise his option to purchase it, he does not have title in the truck, which is part of all of the definitions of "own" and "owner."

Nunn v. C.C. Midwest, 151 S.W.3d 388, 396-97 (Mo. App. W.D. 2004).

While we acknowledge that the word "possess" is included in some of the above-cited definitions of "owner," we agree with the Western District that ownership means something more than mere possession and that the legislature's use of the term "owner" in

the Stock Law without the inclusion of lesser forms of possession or control included in similar statutes evidences a clear intent to exclude from coverage by the Stock Law of such lesser forms of possession or control. Because Defendant was not an owner of the escaped horse, the trial court committed prejudicial error when it gave the jury an instruction that allowed it to render a verdict in favor of Plaintiff based on the Stock Law.

It may well be, as argued by Plaintiff, that "[i]f a horse is boarded, it would be common sense for the liability to be placed upon the party who had possession or control [of] the movements of the animal prior to when it was at large." Nevertheless, "[c]ourts do not have the authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning." ***State v. Rowe***, 63 S.W.3d 647, 650 (Mo. banc 2002). Point granted.

As his remedy, Defendant has requested an outright reversal. We do not believe that to be the appropriate relief under the circumstances present here. "An appellate court should reverse a plaintiff's verdict without remand only if it is persuaded that the plaintiff could not make a submissible case on retrial. 'The preference is for reversal and remand.'" ***Warren v. Paragon Techs. Grp., Inc.***, 950 S.W.2d 844, 846 (Mo. banc 1997) (citing and quoting ***Moss v. National Super Mkts., Inc.***, 781 S.W.2d 784, 786 (Mo. banc 1989)). While Defendant correctly asserts that Plaintiff "did not and could not make a submissible case under the stock law[,]" Plaintiff's petition also invoked principles of general negligence by claiming that "[a]s a direct and proximate result of [Defendant]'s carelessness, negligence and recklessness, Plaintiff sustained [various specifically alleged injuries]."

In good-faith reliance on *dicta* contained in our prior cases, Plaintiff chose to submit her claim against Defendant based on the Stock Law and the trial court approved a jury instruction which allowed her to do so. We cannot say from the record before us that it would be impossible for Plaintiff to present evidence indicating that Defendant was negligent in allowing Mr. Barker's horse to escape onto the public highway.

The judgment of the trial court is reversed, and the matter is remanded to the trial court where Plaintiff may pursue her alternative theory of recovery.[4]

Don E. Burrell, Judge

Barney, J. - Concurs

Bates, P.J. - Concurs

Attorneys for Appellant - Albert C. Lowes and David J. Roth, II, Cape Girardeau, MO.
Attorney for Respondent - Mary L. D. Griffith, Sikeston, MO.

Division One

[4] Because Plaintiff's comparative fault will still be at issue in her negligence claim, our reversal on libability compels a reversal on damages as well. As a result, any new trial will have to address both liability and damages. *See* ***Griffin v. Kansas City Southern Ry. Co.***, 965 S.W.2d 458, 461 n.5 (Mo. App. W.D. 1998) (citing ***Barlett v. Kansas City Southern Ry. Co.***, 854 S.W.2d 396, 403 (Mo. banc 1993)). *See also* ***Phillips v. Lively***, 708 S.W.2d 369, 373 (Mo. App. W.D. 1986); ***Panjwani v. Star Serv. & Petroleum Co.***, 395 S.W.2d 129, 133 (Mo. banc 1965).