NO. COA11-276
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

GAIL PARKER SPOONER,
Plaintiff,

v. Brunswick County
No. 09 CVS 1666

EIFORD CLEMMONS, SR.,
Defendant.

Appeal by Plaintiff from order entered 24 September 2010 by Judge Charles H. Henry in Brunswick County Superior Court. Heard in the Court of Appeals 14 September 2011.

Chris Kremer, for Plaintiff-Appellant.

Ennis, Baynard, and Morton, P.A., by Stephen C. Baynard, for Defendant-Appellee.

BEASLEY, Judge.

Gail Parker Spooner (Plaintiff) appeals an order of summary judgment dismissing her negligence claim. For the following reasons, we affirm.

On 8 June 2006, Plaintiff was driving on US Highway 17 when a horse owned by Eiford Clemmons, Sr. (Defendant) collided with

her car. Plaintiff suffered property damage, as well as physical injury as a result of the accident.

On 1 September 2009, Plaintiff instituted a civil action against Defendant alleging negligence.[1] Defendant, the owner of a mule and a horse, housed both animals on a two-acre lot near Highway 17. On the lot, the animals were contained within the corral. The corral was approximately forty by sixty feet with a partial roof enclosure that was fenced in and fortified by electric hot wire. Adjacent to the corral was the pasture, a larger area where the animals grazed. The pasture was surrounded by hot wires, but was not fenced in. The animals were returned to the corral every night.

In the early hours of 8 June 2006, Michelle Clemmons, Defendant's wife, received a phone call advising her that the horse, Sugar, had been involved in an accident on the highway. Ms. Clemmons went to the scene of the accident and her daughter, Patricia Pigott, surveyed the property. Ms. Pigott noticed that the electric wire surrounding the corral was down and the gate was damaged.

On 26 July 2010, after discovery, Defendant moved for summary judgment, and after oral argument and submissions by the parties, the trial court granted Defendant's motion. The order

[1] On 7 February 2008, Plaintiff filed a previous suit against Defendant and later took a voluntary dismissal.

was entered on 24 September 2010. On 25 October 2010, Plaintiff entered timely notice of appeal.

The sole issue on appeal is whether the trial court erred by granting Defendant's motion for summary judgment. Plaintiff contends that summary judgment was improper. We disagree.

The moving party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009). "Generally, issues arising in a negligence case are not susceptible to summary adjudication. It is only in exceptional negligence cases that summary judgment is appropriate." *King v. Allred*, 309 N.C. 113, 115, 305 S.E.2d 554, 556 (1983) (internal quotation marks omitted). Before summary judgment is properly granted, "the movant must meet the burden of proving an essential element of plaintiff's claim does not exist, cannot be proven at trial or would be barred by an affirmative defense." *Thomas v. Weddle*, 167 N.C. App. 283, 286, 605 S.E.2d 244, 246 (2004) (internal quotation marks and citation omitted). "Moreover, all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal,* 361

N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (internal quotation marks and citations omitted). We review *de novo*. *Id*.

In *Gardner v. Black*, 217 N.C. 573, 576, 9 S.E.2d 10, 11 (1940), our Supreme Court stated:

> 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.

Moreover, "[i]t is the legal duty of every person having charge of an animal to apportion the care with which he uses it to the danger to be apprehended from a failure to keep it constantly under control. He must use such care as is demanded by the circumstances which he knows or may reasonably believe surround him." *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915).

In the case *sub judice*, both Plaintiff and Defendant agree as to the facts of the case, but they differ as to whether the facts support a finding of negligence. Plaintiff asserts Defendant was not entitled to judgment as a matter of law when affidavits of Defendant's wife and daughter reveal that the

horse had previously escaped from the pasture area on at least one occasion before the night of the incident, but had never gotten out of the corral area. Conversely, Defendant contends that he was not negligent because the horse had never escaped from the corral onto the highway and Defendant took all necessary precautions to ensure that the animals could not escape from the corral area.

Here, the issue is whether Defendant acted with the requisite care in keeping the horse in restraint. Our Supreme Court has held that summary judgment is appropriate when "plaintiff fails to show that the [animals] of defendant were at large with his knowledge and consent, or at his will, or that their escape was due to any negligence on his part." *Gardner,* 217 N.C. at 577, 9 S.E.2d at 12.

In the present case, the Plaintiff failed to show negligence by Defendant. The affidavits reveal that the horse had never escaped from the property before this incident. The horse was maintained adequately and the caretakers did not act carelessly in keeping or caring for the horse where (1) Defendant maintained the horse within a corral and electrified hot wire fence that was functioning properly; (2) the horse had never escaped from the property before the night of the incident; (3) an expert opined that an extreme situation occurred which caused the horse to escape, one of which could

have been a third party trying to steal the horse; and (4) Ms. Clemmons arrived at the accident and saw that the horse had a lead, but Ms. Clemmons removed the horse's lead, and would have never left the six to eight foot lead on the horse. Moreover, Plaintiff failed to present evidence in contradiction to Defendant's evidence that he properly maintained the horse and the horse's escape was not foreseeable. Based on the foregoing, summary judgment was proper.

Affirmed.

Judges STEPHENS and ERVIN concur.

Report per Rule 30(e).