

IN THE COURT OF APPEALS OF IOWA

No. 8-611 / 07-1956
Filed December 17, 2008

ROGER M. SIMON,
Plaintiff-Appellee,

vs.

DAN KROGMANN and MARY KROGMANN,
Defendants,

**NATIONWIDE MUTUAL INSURANCE
COMPANY,**
Defendant-Appellant.

Appeal from the Iowa District Court for Delaware County, Alan L. Pearson,
Judge.

Nationwide Mutual Insurance Company appeals the district court's refusal
to grant its motion for judgment notwithstanding the verdict and motion for new
trial. **AFFIRMED.**

John Grier of the Grier Law Firm, Marshalltown, for appellant.

E. Michael Carr and John M. Carr of Carr & Carr, Manchester, for
appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Roger Simon arranged to have Dan Krogmann feed and care for his cattle on Krogmann's farm. Simon raised two types of cattle, feeder cattle and fat cattle, which were kept in separate pens.¹ Krogmann counted the cattle as they came off the delivery trucks at his farm and again when they were shipped out.

Simon had a "farm master" insurance policy from Nationwide Mutual Insurance Company (Nationwide) that covered the period from March 12, 2005, to March 12, 2006. The policy provided coverage for the theft of cattle but did not provide coverage if the loss was discovered upon taking inventory. In addition, the policy provided coverage for the theft of cattle only if there was evidence that the cattle were stolen.

Stacy Barr worked for Great Lakes Cattle and was responsible for monitoring and counting Simon's cattle that were kept on Krogmann's farm. In February 2005, Barr made a full count of all of Simon's cattle on Krogmann's farm.² Barr also visited Krogmann's farm in late March or early April and found that Simon had 210 fat cattle and roughly 350-400 feeder cattle.

In late April 2005, Krogmann called Simon to inform him that he did not believe Simon had enough cattle on his farm to fill the six trucks that were scheduled to ship out his cattle. Simon relayed this message to Barr, who went to the Krogmann farm to investigate Krogmann's concern. Barr testified that he could see, even before he got out of his car, that the pen that held the fat cattle

¹ Fat cattle are the cattle that are going to be ready for market within a few months.

² Simon also had cattle at other locations.

was much emptier than it should have been. He then counted the fat cattle to determine how many were missing and found that fifty-three fat cattle were missing.

Simon claims that the fifty-three fat cattle were stolen. Krogmann observed the cattle on a daily basis and was shocked to hear that cattle were missing. However, when the count was compared with Krogmann's inventory records, Krogmann agreed that fifty-three cattle were missing. Krogmann testified that no evidence indicating theft existed, other than the fact that the cattle were missing. Krogmann further testified there were possible explanations for the missing cattle other than theft, but he believed the cattle had been stolen from his premises.

Scott Lieghtner, an employee of Nationwide, investigated and found no evidence regarding: whether a theft occurred; when a theft might have occurred; or the weight of the missing cattle. Accordingly, Nationwide denied Simon's claim. At trial, Nationwide moved for a directed verdict, but the district court denied the motion. The evidence was submitted to the jury, which found that Simon experienced a theft of fifty-three cattle in April 2005 and that the policy exclusion for inventory-discovered thefts did not apply. Nationwide filed motions for judgment notwithstanding the verdict and for a new trial, which the district court denied.

Nationwide now appeals, arguing that the court erred in denying its motion for judgment notwithstanding the verdict and motion for new trial because: (1) the district court erred in refusing to instruct the jury on a definition of "inventory"; (2) the district court erred by instructing the jury as to one inference that could be

supported by the evidence, but not all possible inferences; (3) there was not sufficient evidence to create a jury question that a theft of fat cattle occurred during the policy period; and (4) Simon discovered the missing cattle upon taking inventory, a loss that was excluded under the policy.

II. Standard of Review

The standard of review of a motion for new trial depends on the grounds for new trial addressed by the district court. *Hoskinson v. City of Iowa City*, 621 N.W.2d 425, 426 (Iowa 2001). Because the motion for new trial was based on the claim that the district court erred on issues of law, we review the district court's ruling on the motion for errors at law. *Olson v. Sumpter*, 728 N.W.2d 844, 848 (Iowa 2007); *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000) (stating that jury instructions are reviewed for errors at law).

We review the district court's ruling on the motion notwithstanding the verdict for correction of errors at law. *Lynch v. Saddler*, 656 N.W.2d 104, 107 (Iowa 2003). "We determine whether substantial evidence exists to support each element of the plaintiff's claim, justifying submission of the case to the jury. In doing so, we review the evidence in the light most favorable to the non-moving party." *Id.* (citations omitted). Error in refusing to give or in erroneously giving a particular jury instruction only warrants reversal if the error was prejudicial. *Hubbell Commercial Brokers, L.C. v. Fountain Three*, 652 N.W.2d 151, 158 (Iowa 2002). "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 268 (Iowa 2000).

III. Failure to Instruct Jury on Definition of “Inventory”

Nationwide argues that the district court erred in refusing to grant a new trial after failing to instruct the jury as to the meaning of “inventory” as used in Simon’s insurance policy. The insurance policy clearly states it does not cover Simon for theft that is discovered upon the taking of inventory. The district court ruled that “inventory” was not defined in the contract and that each party would have to argue the definition to the jury within the context of the evidence.

Interpreting the meaning of contractual words “is an issue for the court unless it depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence.” *Connie’s Constr. Co., Inc. v. Fireman’s Fund Ins. Co.*, 227 N.W.2d 207, 210 (Iowa 1975). Neither party offered extrinsic evidence as to the meaning of “inventory,” and neither presented a fact issue that would allow the jury to determine the meaning as a question of fact. Therefore, the interpretation was a question of law to be decided by the court. *Gen. Cas. Co. of Wis. v. Hines*, 261 Iowa 738, 745, 156 N.W.2d 118, 123 (Iowa 1968). The district court should have determined the meaning of “inventory” as used in the insurance policy and instructed the jury as to its meaning. However, we cannot find that the district court’s failure to give the instruction resulted in prejudice.

Nationwide requested a jury instruction defining inventory as follows:

Inventory in this case is a listing of the number of cattle with additions and subtractions from a beginning number without a physical count of the cattle verifying the number of cattle arrived at by addition or subtraction. “Taking inventory” is the physical counting of the cattle.

A loss is discovered upon “taking inventory” if the evidence establishes that the owner or caretaker of the property did not discover cattle were missing until the caretaker or the owner was informed of the number of cattle that should be present according

to the inventory record and a physical count did not match the number shown in the inventory record.

Even using Nationwide's definition of inventory, the record still does not support the allegation that the loss of cattle was discovered upon taking inventory. The record clearly establishes that Krogmann and Barr knew that cattle were missing before a physical count was conducted. Krogmann called Simon to tell him there were not enough cattle to fill the trucks. Simon called Barr who saw immediately that some fat cattle were missing from the pens. The cattle were counted only to determine exactly how many were missing. Because Simon knew the cattle were missing before the physical count was conducted, we determine that he did not discover that the cattle were missing upon taking inventory. Therefore, the district court's failure to instruct the jury as to the meaning of "inventory" did not result in prejudice and does not warrant reversal.

IV. Misleading Jury Instruction

Nationwide asserts that the district court erred in refusing to grant a new trial after instructing the jury "an inference of theft may be justified when property disappears without the knowledge or authority of its owner in circumstances tending to show it was not accidentally mislaid or lost and did not stray by itself." Nationwide asserts that this instruction called the jury's attention to one inference from the evidence, the possibility that the cattle strayed, and failed to mention other inferences supported by the evidence, such as a mistake in inventory records, a confusion of fat and feeder cattle, or the transfer of the cattle by Simon to another lot.

We are to read and consider jury instructions as a whole, not in isolation. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 536 (Iowa 1999). The instruction at issue continues, stating, “[t]o establish theft by circumstantial evidence the plaintiff must prove the theft was reasonably probable and more probable than any other theory based on the evidence.” We find that when this instruction is read as a whole, it does not mislead the jury. It properly states the law, explaining that the jury should consider any theory based on the evidence. Thus, the jury was instructed to consider any theory presented by Nationwide that was based on the evidence. Nationwide cannot show that prejudice resulted from the jury receiving this instruction.

V. Insufficient Evidence Regarding Theft

Nationwide argues that the district court erred in denying its motion notwithstanding the verdict because Simon did not present sufficient evidence to create a jury question on whether a theft occurred or, if a theft occurred, whether fat or feeder cattle were stolen.

We find that the evidence, when taken in the light most favorable to Simon, is sufficient to create a jury question as to whether a theft occurred.

[A]bsence of direct evidence or physical indicia of theft does not preclude a finding of theft when the trier of fact could find from circumstantial evidence that theft was reasonably probable, and more probable than any other theory based on the evidence.

Wiley v. United Fire & Cas. Co., 220 N.W.2d 635, 637 (Iowa 1974). Krogmann testified that he believed the fifty-three missing cattle had been stolen from his premises and installed surveillance equipment after the incident. He further testified that he believed the only other possible explanation for the

disappearance was that someone had taken a load of cattle for Simon when Krogmann was not on the premises. However, Krogmann testified “I would say they were stolen a lot more than they were pulled out.” In addition, Simon testified that he had never authorized anyone during that period to pull cattle without notifying Krogmann. Krogmann testified that his records matched Barr and Simon’s records, which showed that fifty-three cattle were missing.³ In addition, the county deputy testified that a theft of fifty cattle had been reported in nearby Bremer County and that Fayette County had also “sustained some thefts” of smaller quantities. Thus, while there was no physical evidence of a theft, the circumstantial evidence supported the finding that a theft was reasonably probable and more probable than any other theory.

Proof of theft requires more than proof of mere disappearance. But an inference of theft is justified when property disappears without the knowledge or authority of its owner in circumstances tending to show it was not accidentally mislaid or lost and did not stray by itself.

Long v. Glidden Mut. Ins. Ass’n, 215 N.W.2d 271, 273 (Iowa 1974).

Nationwide asserts that the evidence supports any of the following conclusions: (1) feeder calves, not fat calves, were stolen; (2) the cattle were moved to another Simon location; or (3) Krogmann’s inventory records were erroneous. We disagree. Given that the evidence does not support any of Nationwide’s alternative explanations as to how the cattle disappeared, an inference of theft is justified in this case. The evidence established that three different inventory records all showed the same loss of fifty-three fat cattle. The

³ Although Barr did not remember at trial that 136 cattle had been removed in two separate loads earlier in April, the records of all three men showed that fifty-three cattle were missing.

testimony of Barr, Krogmann, and Simon supports the claim that fat cattle and not feeder cattle were missing. Krogmann and Simon's testimony established that Simon did not have anyone remove his cattle from Krogmann's farm without first notifying Krogmann. Thus, while there is no direct evidence of a theft, the circumstantial evidence supports the conclusion that a theft was more probable than any other theory.

We find that *Gifford v. M.F.A. Mutual Insurance Co.*, 437 S.W.2d 714 (Mo. App. 1969), is unpersuasive in this case. The insurance policy in *Gifford* specifically disallowed coverage for "mysterious disappearance," and the court found the evidence showed only "mysterious disappearance." *Gifford*, 437 S.W.2d at 715. In addition, the *Gifford* court found that the cattle owner had not satisfied his burden of proving theft. *Id.* at 717. Simon's policy, on the other hand, did not contain an exclusion for "mysterious disappearance," but required evidence that the property was stolen. We review only to find if sufficient evidence existed to create a jury question. We find that substantial evidence of a theft existed, justifying submission of the issue to the jury.

Further, we find that substantial evidence supported Simon's claim that fat cattle, not feeder cattle, had been stolen. Krogmann first noticed that cattle were missing when he realized Simon did not have enough fat cattle to fill the next load he was scheduled to ship. Krogmann also testified that he believed the missing cattle were fat cattle from the finishing group. Barr testified that he saw 210 fat cattle in the finishing pen in late March or early April. When he came to investigate Krogmann's concern that Simon did not have enough cattle on the premises to ship a full load, Barr testified he instantly noticed a reduction in the

number of fat cattle. Simon also testified that the missing cattle were fat cattle. He testified that Krogmann uses a chute to count the cattle. He went on to explain that, because of the system used to move cattle from pen to pen, the only cattle that could have been missing were fat cattle. We find that the district court did not err in finding that sufficient evidence existed to create a jury question as to whether fat cattle were stolen and refusing to grant Nationwide's motion for judgment notwithstanding the verdict.

VI. Conclusion

We find that the district court's error in failing to instruct the jury as to the meaning of "inventory" did not result in prejudice because, even under Nationwide's broad definition of "inventory," Simon still discovered the theft before taking inventory. No prejudice resulted from the jury receiving an instruction that called attention to certain inferences and failed to mention others. Finally, there was sufficient evidence of a theft of fat cattle to create a jury question.

AFFIRMED.