

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002319-MR

ROBERT H. MEYERS, M.D.

APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT  
HONORABLE TYLER L. GILL, JUDGE  
ACTION NO. 96-CI-00450

FRED WRIGHT AND BARBARA WRIGHT

APPELLEES

OPINION  
REVERSING AND REMANDING  
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BEFORE: GUDGEL, CHIEF JUDGE, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Dr. Robert Meyers appeals from a judgment holding him liable for injuries to a Rottweiler dog owned by Fred and Barbara Wright and the awarding of punitive damages to the Wrights. The Wrights, who reside next to a cattle farm owned by Dr. Meyers, filed this action after someone shot their Rottweiler on Meyers's property while the dog was chasing cattle. Because KRS 258.235 authorizes the killing of any dog worrying or pursuing any livestock, we reverse and remand for an order of dismissal.

The Wrights live in an upscale residential development which borders the Meyers's farm. Dr. Meyers lives in Illinois

but has farm hands to run the day-to-day operations of his cattle farm. On March 19, 1996, Mr. Wright was in his living room when he noticed his dog, Tucker, walking in the deep snow in Meyers's field. In the distance, about 250 yards, he saw Mr. Thomas's truck and a person he assumed was Wendell Thomas, a field hand. The field hand was feeding the cattle when the dog, at 150 yards, ran toward the cattle. A short time later the truck was leaving and Tucker was dragging himself back across the field. Mr. Wright took Tucker to a veterinarian for treatment of a gunshot wound.

The Wrights filed suit against Dr. Meyer and Wendell Thomas for costs of surgery and medical expenses, lost wages, transportation costs, attorney fees and costs. Discovery was taken in which Dr. Meyers admitted that he called Fred Wright on five occasions and talked to him in person once. Dr. Meyers apparently had seen Tucker chasing his cows on numerous occasions and was blaming Tucker for numerous deaths and injuries. Dr. Meyers told Mrs. Wright that if Tucker kept chasing his cows, he would have him shot.

The Wrights' attorney made a motion to set for jury trial and Meyers's attorney made a motion to withdraw as attorney for nonpayment of fees. Both motions were heard at motion hour on December 17, 1997. The court set the matter for trial on January 22, 1998, and the clerk certification shows a copy to "All Counsel". On the same date, the clerk entered an agreed order signed by the attorneys and the judge allowing defendants' counsel to withdraw. The judge added, "Defendant granted 30 days

to obtain new counsel." This order was not certified by the clerk as being served on anyone. There is nothing in the record prior to trial to indicate defendants were given the notice of the trial date or that counsel had withdrawn. On January 23, 1998, the date set for trial, the Wrights appeared, as well as Wendell Thomas, the co-defendant. Dr. Meyers failed to appear. Mr. Wright testified as to the above events and damages. Mr. Wright did admit he didn't see who shot Tucker, but right before and after the shooting, he saw Thomas's truck in the field and saw it leave. Mrs. Wright testified as to her conversation with Dr. Meyers. Wendell Thomas testified that he didn't have an attorney and hadn't received notice of the trial. He testified without objection, that Mr. Duffy saw the Wrights' dog chasing cattle, that someone in the trailer saw the dog chasing and eating cattle. The judge struck this testimony as hearsay and then asked Mr. Thomas if he shot either the cattle or the dog, to which Mr. Thomas testified, "no." He offered that he hadn't heard the doctor order any dog shot. He admitted he owned a number of vehicles and one similar to the truck Mr. Wright described.

At the conclusion of the trial, the judge ruled that using his best guess, Dr. Meyers more likely than not had a direct involvement in having the dog shot and that Mr. Thomas did not shoot the dog, even though either Dr. Meyers or someone else did. Judgment was granted for requested relief plus, sua sponte, \$500 in punitive damages because the dog was shot where it didn't put cattle in danger. The judge did explain that if evidence was

introduced that the dog killed a cow or was eating a cow, the Wrights would not have received anything.

On motion to alter, amend or vacate by Dr. Meyers's attorney, he alleged his clients hadn't received notice of the trial and sought to have the default set aside. The judge reviewed the order setting for trial and the motion to withdraw as counsel and concluded that even though the attorney withdrew, he had an obligation to notify his clients and if he didn't, the plaintiffs shouldn't suffer.

There are a number of issues raised in this appeal, but we can dispose of this case by citing KRS 258.235 which allows a person to shoot a dog "pursuing, worrying, or wounding any livestock, . . ." Id., Section 1. The trial court in its findings said that the dog would have had to kill or eat the beef before it could be shot.

We disagree with the trial court's interpretation of KRS 258.235 and, therefore, reverse that part of the judgment which was against Dr. Robert Meyers.

GUDGEL, CHIEF JUDGE, CONCURS.

HUDDLESTON, Judge, CONCURS IN PART IN RESULT AND DISSENTS IN PART BY SEPARATE OPINION.

HUDDLESTON, Judge, CONCURRING IN PART IN RESULT AND DISSENTING IN PART: Fred and Barbara Wright sued Dr. Robert Meyers and his farm hand, Wendell Thomas, in Logan District Court to recover compensatory damages for injury to their Rottweiler dog. The complaint does not state a cause of action against either of the defendants. The plaintiffs simply allege that on March 19, 1996,

Fred Wright saw a rust colored truck belonging to Thomas leaving a neighboring farm owned by Dr. Meyers. Immediately thereafter, according to the complaint, Fred Wright discovered that his dog had been shot. The plaintiffs do not allege that either Thomas or Dr. Meyers, or any of Meyers's employees, shot the dog. They only allege that "approximately one month prior to their dog being shot, Robert Meyers, M.D., called the Wright's [sic] home and stated 'I'm ordering your dog shot.'"

Meyers and Thomas, by counsel, denied the essential allegations of the complaint in their answer and demanded a trial by jury, but they did not move to dismiss the complaint for failure to state a claim upon which relief can be granted.<sup>1</sup> Meyers filed a counterclaim seeking damages for the destruction of his cattle by the Wrights' dog and later amended it to seek damages in excess of the jurisdictional limits of the district court. Both defendants again demanded a trial by jury. The district court ordered the amended counterclaim filed and transferred the case to Logan Circuit Court.

On August 7, 1997, counsel for Meyers and Thomas moved the circuit court for permission to withdraw as their attorney of record because he had not been paid. The record does not reflect that the motion was served on either defendant (or on counsel for the plaintiffs) or that it was scheduled for a hearing. On December 1, 1997, the Wrights moved to set this case for a jury trial and noticed the motion for a hearing on December 17, 1997. Counsel for Meyers and Thomas renewed his motion for permission

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<sup>1</sup> See Ky. R. Civ. Proc. (CR) 12.02(f).

to withdraw as their attorney of record. This time he certified that the motion, which was also scheduled for a hearing on December 17, 1997, had been served by mail on both defendants and upon counsel for the plaintiffs.

On December 22, 1997, two orders were entered, one permitting counsel for Meyers and Thomas to withdraw and giving the defendants thirty days to obtain new counsel, and the other setting this case for a bench trial on January 22, 1998. The order scheduling the case for trial reflects the court's instruction that it is to be sent to "All counsel," while the other order contains no service instructions. The docket sheet prepared by the clerk states that these two orders (as well as all other orders generated by the court) were served on "all counsel of record and all parties not represented by counsel."

The case came on for trial before the court as scheduled on January 22, 1998. The Wrights and their counsel were present, as was Wendell Thomas. Dr. Meyers was absent and was not represented by counsel. The only proof that implicated Dr. Meyers was that he had called the Wrights on more than one occasion to complain that their dog had attacked and destroyed his cattle and that on at least one occasion he had threatened to have the Wrights' dog shot if it continued to come upon his property. There was no proof that he was present when the dog was shot or that he had ordered Thomas or any of his other employees to shoot the dog. Nevertheless, the court granted

judgment<sup>2</sup> for the Wrights against Dr. Meyers awarding them compensatory damages in the sum of \$1,081.00, punitive damages amounting to \$500.00,<sup>3</sup> and court costs totaling \$140.00. The Wrights' claim against Wendell Thomas was dismissed because of a lack of proof that he had anything to do with the shooting of the dog. Although the judgment did not address Dr. Meyers's counterclaim, it was made final and appealable.<sup>4</sup> In rendering its judgment, the court made no written findings of fact and reached no conclusions of law, but it did find orally upon the record that: (1) more likely than not, Dr. Meyers had direct involvement in causing the dog to be shot; (2) Wendell Thomas did not shoot the dog; and (3) more likely than not, Dr. Meyers or some other employee shot the dog.

Within ten days following entry of judgment, Meyers employed new counsel and moved to alter, vacate or amend the January 27, 1998, order/judgment on the ground that he was not notified that the case had been set for trial. He also alleged generally that the plaintiffs' case was not ripe for judgment because "this dispute involves master[-]servant relationships, trespassing, and factual issues." Meyers submitted four affidavits with his motion, including his own, his wife's and those of his Illinois and Kentucky office managers, attesting to the fact that he was never served with notice that the case had

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<sup>2</sup> The judgment was entered on January 27, 1998. It is denominated an "order," but is, nevertheless, a final judgment. CR 54.01.

<sup>3</sup> The plaintiffs did not seek recovery of punitive damages.

<sup>4</sup> See CR 54.02(1).

been set for trial. Meyers's post-judgment motion was "overruled [sic - denied]," and this appeal followed.

The essence of Dr. Meyers's argument on appeal is that he was denied due process when the court proceeded to trial in his absence and without giving him notice that a trial was scheduled and that the court erred as a matter of law in granting judgment for the Wrights after it dismissed their claim against Thomas, the only Meyers employee alleged to have been present when the dog was shot.

Although findings of fact are not required when the court rules on a motion such as Dr. Meyers's post-judgment motion to vacate, etc.,<sup>5</sup> it would have been helpful to this Court had the circuit court determined the factual issue of whether Meyers did or did not receive notice that the case had been set for trial. However, there was no request for such a finding, and in denying Meyers's post-judgment motion the court inferentially determined that proper notice of the trial date was given.

A party to an action tried by the court without a jury may challenge the sufficiency of the evidence to support the finding without first having made in the trial court an objection to such findings or having moved to amend them or having moved for a new trial.<sup>6</sup> In this case, there is absolutely no support in the evidence for a finding that Dr. Meyers had direct involvement in the shooting of the Wrights' dog, nor is there any evidence whatever that Dr. Meyers or one of his employees (other

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<sup>5</sup> CR 52.01.

<sup>6</sup> CR 52.03.

than Thomas, who the court found not liable) shot the dog. The findings should, therefore, be set aside and this case remanded to the circuit court with directions to dismiss the Wrights' complaint.

There is another reason why the judgment under review cannot stand involving a question of law which we review de novo.<sup>7</sup> In my view, the court erred in granting judgment against Dr. Meyers after it had dismissed the Wrights' claim against Thomas, the only other person alleged to have been involved in the shooting of the Wrights' dog.

This issue was addressed by this Court in Copeland v. Humana of Kentucky, Inc.<sup>8</sup> and in Floyd v. Humana of Virginia, Inc.<sup>9</sup> In Floyd we said that:

On appeal, Floyd first argues that it was error for the Jefferson Circuit Court to grant University of Louisville and University of Louisville Hospital, Inc., summary judgments following the dismissal of Dr. Lucas. Floyd attempts to hold those defendants liable for conduct by physicians other than Dr. Lucas. None could dispute that ordinary agency law makes a master liable for the negligent acts of his servant; however, in this case, Floyd alleged no negligent acts of servants of University of Louisville and University Hospital, Inc.,

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<sup>7</sup> Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1998).

<sup>8</sup> Ky. App., 769 S.W.2d 67 (1989).

<sup>9</sup> Ky. App., 787 S.W.2d 267 (1990).

other than Dr. Lucas. Accordingly, the summary judgment was proper.<sup>10</sup>

In Copeland, we offered the following rationale for a like decision:

It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be blameless.

This result is required for either or both of two reasons: "that such a result will avoid circuitry of action or that since the liability of the master or principal is merely derivative and secondary, exoneration of the servant removes the foundation upon which to impute negligence to the master or principal."<sup>11</sup>

There is simply no allegation nor any proof in this case that Dr. Meyers shot the Wrights' dog or directed or conspired with anyone else to do so. Thus, he can only be held liable vicariously if one of his employees was guilty of the act. Since the only employee identified as a possible perpetrator of the act, Thomas, was dismissed from the lawsuit, it follows that Meyers cannot, as a matter of law, be held liable to the Wrights.

The majority decides that the circuit erred court erred when it failed to apply Kentucky Revised Statute (KRS) 258.235(1) to the facts of this case. That statute, which allows a person

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<sup>10</sup> Id. at 269 (citation omitted).

<sup>11</sup> Copeland, supra, n. 8, at 69 (citations omitted).

to shoot a dog that is "pursuing, worrying, or wounding any livestock . . . ," can only come into play after it is first determined that Meyers or one of his employees actually shot the Wrights' dog; but, as has been noted, there is no evidence to support such a finding. In this respect, KRS 258.235(1) is not dissimilar to a self-defense plea in a criminal case where the defendant admits that he shot the victim but justifies having done so because he was acting in defense of his person. In my view, the statute has no relevance to this case given the evidence heard by the circuit court.

I also believe that this case should be remanded to the circuit court to consider Dr. Meyers's counterclaim. The circuit court did not dismiss the counterclaim, so it is still pending. Meyers's claim is not a compulsory counterclaim since it does not arise out of the transaction or occurrence that is the subject matter of the Wrights' claim, that is, the shooting of their dog.<sup>12</sup> In fact, it is because Meyers's counterclaim is a permissive one<sup>13</sup> that the court could properly make its judgment, which did not adjudicate all the rights of all the parties in the action, final and appealable.<sup>14</sup>

I would reverse the final judgment in favor of the Wrights and remand this case to Logan Circuit Court with directions, first, to enter judgment dismissing the Wrights'

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<sup>12</sup> See CR 13.01.

<sup>13</sup> See CR 13.02.

<sup>14</sup> CR 54.01; CR 54.02(1).

complaint and, second, to schedule a jury trial to resolve Meyers's counterclaim.

BRIEF FOR APPELLANT:

Charles R. Orange  
Russellville, Kentucky

BRIEF FOR APPELLEES:

Elizabeth D. Wilson  
Russellville, Kentucky