IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01267-COA

DIANA LADNIER AND LAWRENCE LADNIER **APPELLANTS**

v.

JOSEPH HESTER **APPELLEE**

DATE OF JUDGMENT:	07/20/2010
TRIAL JUDGE:	HON. KATHY KING JACKSON
COURT FROM WHICH APPEALED:	GEORGE COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANTS:	JAMES K. WETZEL GARNER J. WETZEL
ATTORNEY FOR APPELLEE:	TRISTAN RUSSELL ARMER
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED TO DEFENDANT
DISPOSITION:	AFFIRMED - 10/11/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE GRIFFIS, P.J., BARNES AND ROBERTS, JJ.

BARNES, J., FOR THE COURT:

¶1. This personal-injury case involves an automobile collision between Diana Ladnier and Diego, a horse owned by Joseph Hester. Diana and her husband, Lawrence Ladnier, appeal the judgment of the Circuit Court of George County, which granted summary judgment in favor of Hester. Finding no error, we affirm.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

¶2. Shortly after midnight on January 2, 2008, Diana was driving her vehicle on River Road near Lucedale, Mississippi, returning home from her job as a correctional officer at a

local facility, when three horses ran across the road. She struck the largest horse – Diego – who weighed approximately 1,000 pounds. Diana claims she was not speeding, and the road was unlit and dark. The horses were owned by Hester. Diana alleged that, due to the accident, she sustained serious personal injuries resulting in medical bills well over $69,000 and damage to her vehicle.[1] As a result, the Ladniers filed a personal-injury suit against Hester in the Circuit Court of George County; Diana claimed Hester was negligent for allowing his three horses to roam free on River Road,[2] while Lawrence sued for loss of consortium.

¶3. Hester had owned the property where the horses were kept since March 2006. The property contained approximately six acres of land and Hester's residence. Three acres were fenced pasture for his horses, with approximately half of this area fenced by barbed wire. The other half was fenced by "field fence," which was made from four-feet high "horse and cattle box wire" with six-foot steel posts spaced every ten feet. Hester erected this fence when he purchased the property, and since then, the horses have resided there. After the accident, Hester determined that his three horses had escaped by trampling down a portion of the field fence. However, Hester stated that the horses had never broken out of their enclosure during the two-year period from March 2006 until this incident.

¶4. Usually, Hester visually inspected the fence when he fed the horses grain at

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[1] Diego was badly injured as well, but it survived its encounter with Diana's vehicle.

[2] In the complaint the Ladniers also claimed that Hester violated Mississippi Code Annotated section 69-13-111 (Rev. 2005) for allowing his horses to roam on a "major county road." However, the Ladniers abandoned this claim when they discovered this statute did not apply to River Road as it was not a federal or state designated highway as required by statute.

approximately 6:00 p.m. each evening. He did so the evening of the incident, but he did not observe any problems with the fence that evening. Diana and Lawrence also own horses. Diana admitted she did not know exactly how Hester's horses got out of the fence, and she did not observe any problems with the fence. Hester mentioned that his neighbor had let the horses graze on his pasture across the road at least one week out of every month in the prior summer before the incident. Lawrence speculated that Hester had inadequately fed his horses and that they escaped to feed on Bahia grass in the neighbor's pasture, which is where two of the horses were found after the accident.

¶5. After the completion of discovery, Hester moved for summary judgment, claiming that the Ladniers could not produce any evidence that he was negligent in securing his horses. The trial court agreed and granted summary judgment. The Ladniers now appeal, raising two issues: there was a genuine issue of material fact about whether Hester was negligent in the confinement of his three horses, and the Ladniers presented ample circumstantial evidence for a jury determination on negligence.

STANDARD OF REVIEW

¶6. When examining a grant or denial of a motion for summary judgment, the appellate court applies a de novo standard of review. *State ex rel. Hood v. Louisville Tire Ctr., Inc.*, 55 So. 3d 1068, 1072 (¶9) (Miss. 2011) (citing *Evan Johnson & Sons Constr., Inc. v. State*, 877 So. 2d 360, 364 (¶11) (Miss. 2004)). Summary judgment shall be granted if "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 the moving party is entitled to a judgment as a matter of law." *Id.* (quoting M.R.C.P. 56(c)).

The trial court must review the evidence in the light most favorable to the nonmoving party. *Id.* The movant bears the burden of proving that no genuine issue of material fact exists. *Moss v. Batesville Casket Co.*, 935 So. 2d 393, 399 (¶16) (Miss. 2006) (citing *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990)). "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed. Otherwise the decision is affirmed." *Moss*, 935 So. 2d at 399 (¶18) (quoting *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997)).

ANALYSIS OF THE ISSUES

I. Negligence Claim

¶7. The Ladniers argue that there is a genuine issue of material fact as to whether Hester was negligent in using box wire "field fence" for a portion of the horses' enclosure, instead of barbed wire. They claim whether the "field fence" was reasonable under the circumstances presents a fact question for a jury to decide.

¶8. The Mississippi Supreme Court has specifically commented on a livestock owner's liability for stray livestock in *Pennyan v. Alexander*, 229 Miss. 704, 91 So. 2d 728 (1957) and *Barrett v. Parker*, 757 So. 2d 182 (Miss. 2000). To support a claim of negligence, the plaintiff must submit proof showing the defendant: "(1) failed to exercise reasonable care to keep the [animal] from being at large, and (2) that such failure, if any, resulted in the escape of the [animal] from its enclosure, and (3) that the [animal] owner's failure to exercise such reasonable care proximately caused injury to the motorist who collided with the [animal]." *Barrett*, 757 So. 2d at 188 (¶16). "Apart from statute or ordinance the owner of a domestic animal is not under an absolute duty to keep it from being loose and unattended

on the highway and its being there is not in itself . . . unlawful or a wrong to the person injured or . . . whose property is damaged." *Pennyan*, 229 Miss. at 713, 91 So. 2d at 732 (quoting 2 Am. Jur. *Animals* § 738). Thus, the mere fact that livestock escapes from an enclosure and an accident occurs is not, in itself, evidence of negligence on the part of the livestock owner. *Barrett*, 757 So. 2d at 187 (¶15). The plaintiff must prove actual negligence. *Id.* at 187-88 (¶15).

¶9. Summary judgment "is mandated where the respondent has failed 'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Smith ex rel. Smith v. Gilmore Mem'l Hosp., Inc.*, 952 So. 2d 177, 180 (¶9) (Miss. 2007) (quoting *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996)). Mississippi Rule of Civil Procedure 56(e) explains the Ladniers' burden: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

¶10. Hester provided the following evidence that no genuine issue of material fact existed regarding the Ladniers' negligence claim. Hester described the field fence at issue as "just basic horse and cattle box wire." Importantly, the horses had not escaped their pasture in the two years prior to the incident, since they had been enclosed there, with the same fence at issue. Hester determined that in this instance, the horses had escaped by smashing down the box-wire field fence to approximately two feet from the ground, but there was no evidence as to why. While Lawrence theorized that Hester's horses were malnourished, hungry, and

enticed by the Bahia grass in the pasture across the road, the evidence showed otherwise. Hester fed his horses daily at 6:00 p.m. with grain and/or hay, and he maintained he had fed the horses approximately six hours before the escape. Hester also visually inspected the fence daily during feeding time, and nothing appeared amiss the night before the accident. Further, while Hester's neighbor had let Hester's horses graze on his Bahia grass approximately one week per month, the horses had grazed only during the prior summer, which was six months before the incident.

¶11. The Ladniers argue that Hester had a duty to use a proper enclosure to keep his horses from roaming on River Road, and his decision to use field fence for a portion of this enclosure breached that duty of care. They further contend that a reasonable person knew or should have known the horses would compromise the field fence, with the foreseeable consequences and risks that the horses would escape and be struck by a vehicle on the road. Therefore, the Ladniers concluded that a reasonable person should have known that using a field fence to contain horses was a dangerous hazard for drivers.

¶12. However, the Ladniers' arguments fail because they did not produce any evidence, such as testimony, exhibits, expert opinions, product warnings, or recognized industry standards, to rebut Hester's evidence that the field fence was adequate for containing horses under the circumstances. The "[nonmoving] party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict." *Lott v. Purvis*, 2 So. 3d 789, 792 (¶11) (Miss. Ct. App. 2009) (quoting *Wilbourn*, 687 So. 2d at 1213). Importantly, "bare assertions are simply not enough to avoid summary judgment." *Watson v. Johnson*, 848 So. 2d 873, 878 (¶18) (Miss.

Ct. App. 2002) (citing *Travis v. Stewart*, 680 So. 2d 214, 218 (Miss. 1996)). The Ladniers state there are "countless factors" a jury could take into consideration regarding whether the field-fence section of the enclosure was unreasonable, such as its construction and the size of the animals, but they fail to offer any proof to support these factors. There is also no evidence that Hester's fencing was in poor condition. Additionally, if, as the Ladniers argue, only barbed-wire fencing is adequate to restrain horses and field wire is inadequate, the Ladniers should have offered recognized industry standards and expert testimony stating such. Instead, the Ladniers only present arguments as the basis of their rebuttal, yet they bear the burden to support their arguments on summary judgment with evidence that they would bear the burden of proving at trial.

¶13. The Ladniers also claim that Hester's horses had a propensity for harm, which furthers their negligence claim. In *McMillan v. Rodriguez*, 823 So. 2d 1173, 1178 (¶13) (Miss. 2002), the supreme court spoke to this issue: "Generally, '[t]he owner or keeper of a domestic animal is charged with knowledge of the natural propensities of animals of the particular class to which this animal belongs, and, if these propensities are of the kind that might cause injury he must exercise the care necessary to prevent such injuries as may be anticipated.'" (Quoting 4 Am. Jur 2d *Animals* § 102 (1995)). The evidence, however, shows the horses did not have a propensity for harm. Hester stated that none of his horses had "mean" propensities. He did admit that, in general, horses like to lean on fences and roam. However, as the trial court noted, just because horses generally have these propensities would not put a reasonable person on notice that Hester's horses would trample a field fence and escape, causing injury to a motorist. Further, Hester claimed that Diego, while wanting to be the

"boss of the pen," was not high strung, but had a calm and "kind of curious" demeanor. Diego was also excellent with children, of whom Hester has five. Hester described his other two horses as "laid back." Finally, neither the Ladniers nor Hester presented any evidence that Hester's horses had a propensity to smash down fences and escape from their pasture. Nor do the Ladniers provide any evidence to support their contention that hunger caused the horses to escape.

¶14. The Ladniers fail to meet their burden of proof showing there is a genuine issue of material fact on the elements of negligence. They produced no evidence that Hester failed to act with reasonable care in enclosing his horses or that the horses had any propensities to escape or cause injuries. Therefore, this issue is without merit.

2. Circumstantial Evidence

¶15. Next, the Ladniers argue that negligence may be proven through circumstantial evidence and that a jury could conclude that Hester acted unreasonably in choosing field fence to enclose his horses. Ladnier cites to *K-Mart Corp. v. Hardy*, 735 So. 2d 975, 981 (¶17) (Miss. 1999) for the proposition that "negligence may be established by circumstantial evidence in the absence of testimony by eyewitnesses provided the circumstances are such as to take the case out of the realm of conjecture and place it within the field of legitimate inference." (Citing *Downs v. Choo*, 656 So. 2d 84, 90 (Miss. 1995)).

¶16. The Ladniers request that this Court infer that Hester's construction of the fence was faulty and that his choice of field fence was unreasonable. They refer to the fence as "dilapidated" and state "common sense" should guide the case. A photograph of the portion of the fence at issue was entered into evidence, but it does not appear "dilapidated." Hester

admitted the photograph was taken after he had pulled up the trampled portion of the fence. The Ladniers also claim that circumstantial evidence supports the probability that the horses escaped to graze on the Bahia grass across the road.

¶17. However, in *Barrett*, a case factually similar to this one, the supreme court explained: "[I]t would not be impossible for a cow to escape and get onto a nearby road even though its owner was not negligent in any manner in his confinement of the cow. Therefore, allowing the jury to infer negligence . . . simply because [the defendant's] yearling was loose on the road would not be appropriate." *Barrett*, 757 So. 2d at 187 (¶15). While the jury could infer negligence on the defendant's part from other evidence besides that the animal escaped, such as that the fence was in poor condition, here, we have no such "other" evidence from which to infer negligence. According to the record, the horses were well fed, and the fence was in good condition.

CONCLUSION

¶18. For the above-stated reasons, we conclude that the trial court did not err in granting summary judgment in favor of Hester.

¶19. **THE JUDGMENT OF THE CIRCUIT COURT OF GEORGE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.**

GRIFFIS, P.J., ISHEE, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, C.J., AND RUSSELL, J. MYERS, J. NOT PARTICIPATING.

IRVING, P.J., DISSENTING:

¶20. The majority finds that the circuit court did not err in granting summary judgment for

Hester in the Ladniers' lawsuit against Hester for injuries they sustained when their vehicle collided with Diego, a horse owned by Hester. Because I believe the evidence fails to show that Hester proved that he was entitled to summary judgment as a matter of law, I dissent. I would reverse and remand this case for a trial on the merits.

¶21. The majority's recitation of the facts are sufficient to provide a general understanding of the issue presented; therefore, I will recite only such additional facts as may be pertinent to my view of the proper resolution of the issue. In support of his motion for summary judgment, Hester submitted a memorandum or law, the depositions of himself and of the Ladniers, and a photograph of the damaged fence.

¶22. The proponent of a motion for summary judgment must show—based upon the "pleadings, depositions, answers to interrogatories[,] and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." M.R.C.P. 56(c). This requirement places upon the movant the burden of persuasion and production. *Sweet v. TDI MS, Inc.*, 47 So. 3d 89, 93 (¶17) (Miss. 2010). If the proponent makes such a showing, the opponent, or adverse party, cannot then rest on his pleadings; he must then show by affidavits or by other means permitted by Rule 56 "that there is a genuine issue for trial." M.R.C.P. 56(e). In other words, Hester, as the moving party, had a responsibility to first show that he was entitled to summary judgment as a matter of law before the Ladniers were required to respond and show that there was a genuine issue for trial. *John v. Louisiana (Bd. of Tr. for State Coll. & Univ.)*, 757 F. 2d 698, 708 (5th Cir. 1995). The evidence must be viewed in the light most favorable to the Ladniers. *Sweet*, 47 So. 3d at 91 (¶9). If there is doubt regarding the existence of a

genuine issue of material fact, the benefit goes to the Ladniers. *Miller v. R.B. Wall Oil Co.*, 970 So. 2d 127, 130 (¶5) (Miss. 2007). Furthermore, the court should err in favor of a trial on the merits. *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 363 (Miss. 1983).

¶23. The record reflects that Hester did not attach an affidavit from an expert indicating that his fence was adequate for the containment of horses, nor did he show what the industry standard is for the construction of fences for the containment of horses and that he met that standard. Further, Hester did not present an itemization of the uncontested facts with his motion for summary judgment. He did, however, list the following facts as a part of his memorandum, which he contends the summary-judgment evidence establishes conclusively:

> (1) Diana was traveling southbound on River Road just after midnight on January 2, 2008, when the vehicle she was driving struck a horse owned by Hester;
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> (2) Three horses owned by Hester had escaped from the fenced-in field next to Hester's home by trampling down the barbwire fence;
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> (3) The horses had been in the fenced area since March of 2006;
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> (4) The fence where the horses escaped had been erected in March 2006;
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> (5) The fence where the horses escaped was made of "horse-and-cattle box wire" with six-foot steel posts spaced approximately every ten feet;
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> (6) By January of 2008, the horses had been on the property just shy of two years;
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> (7) Hester fed the horses daily;
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> (8) Prior to the accident, Hester had fed the horses at 6:00 p.m., which would have been just six hours before the accident;
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> (9) Hester testified that most of the time he checked the fence every night during feeding time and that he visually observed the fence on January 1, 2006, at approximately 6:00 p.m.

(10) Diana testified that she did not know how the horses got out of the fence;

(11) Diana also stated that she knew of no problems with the fence; and

(12) Lawrence did not have any knowledge of the horses having gotten out of the fence before.

¶24. It is clear to me that the facts listed above do not show that the fence that Hester constructed in March 2006 was suitable or adequate for maintaining Diego and the other two horses that escaped. Nor do they show that Hester was not negligent in choosing what he called "just basic horse and cattle box wire" to construct half of the fence rather than some other wire specifically suited for containing large animals. Diego weighed at least one thousand pounds. Again, it was Hester's responsibility to show that he was entitled to judgment as a matter of law, which means that, at the summary-judgment stage, he must show that he was not negligent. But if we were to accept, as the majority does, that the failure of the horses to escape for nearly two years proves that the fence was adequate and that Hester was not negligent in utilizing "just basic horse and cattle box wire," the converse would also be true. That is, since the horses *did* escape, despite never having done so for nearly two years, the fence had to be inadequate, for if the fence was adequate, the horses would have never escaped

¶25. The majority, as well as the trial court, embraces the evidentiary basis offered by Hester, which in the view of the majority justifies the granting of summary to Hester:

> Hester provided the following evidence that no genuine issue of material fact existed regarding the Ladniers' negligence claim. Hester described the field wire fence at issue as "just basic horse and cattle box wire." Importantly the horses had not escaped their pasture in the two years prior to the incident, since they had been enclosed there, with the same fence at issue. Hester determined that in this instance, the horses had escaped by smashing down the

> box wire field fence to approximately two feet from the ground, but there was no evidence as to why. While Lawrence theorized that Hester's horses were malnourished, hungry, and enticed by the Bahia grass in the pasture across the road, the evidence showed otherwise. Hester fed his horses daily at 6:00 p.m. with grain and/or hay, and he maintained the horses had been fed approximately six hours before the escape. Hester also visually inspected the fence daily during feeding time, and nothing appeared amiss the night before the accident. Further, while Hester's neighbor had let the horses graze on his Bahia grass approximately one week per month, that had only been during the prior summer, six months before the incident.

Majority opinion at (¶10). It is clear from the quoted passage that the majority has concluded that since the horses did not escape for nearly two years, there is no genuine issue of fact regarding the adequacy of the fence. As stated, the glow of this reasoning dims when it is extended to its logical end, as it would be just as true, following this reasoning, that the fence was inadequate since the horses did escape. "Summary judgment is inappropriate when there are undisputed facts which are susceptible to more than one interpretation." *Johnson v. City of Cleveland*, 846 So. 2d 1031, 1036 (¶14) (Miss. 2003) (quoting *Canizaro v. Mobile Commc'n Corp. of Am.*, 655 So. 2d 25, 28 (Miss. 1995)). I do not think that it can be reasonably disputed that a fence that is properly constructed out of proper materials and properly maintained can keep a horse from escaping. Whether that was the case here is, in my opinion, a jury question in the absence of any proof, at the summary judgment-stage, that the fence was constructed to industry standards for maintaining large horses.

¶26. It is of some significance that a portion of the fence was constructed with barbwire and the remainder was constructed with what Hester described as "basic horse and cattle box wire." Lawrence, testifying by deposition, described the wire as field-fence wire and said that, based on his experience, field-fence wire was unsuitable for containing horses. It does

not appear to me that Hester can be considered an expert on wire fences for the containment of horses simply because he built a fence that contained the horses for nearly two years before they escaped. Lawrence testified that he was a "horse person" and that he had built many fences for the containment of horses. He also testified that he had a "high intensity, all electric fence" for his horses. Clearly, Lawrence's testimony that Hester's fence was inappropriate for containing horses deserves as much credit as Hester's, as the evidence shows that Lawrence is as knowledgeable of horse fences as Hester, if not more so. Since Hester and Lawrence contradict each other regarding the adequacy of Hester's fence, it cannot be said that no genuine issue of material fact remains for trial, as the adequacy of Hester's fence is central to whether he was negligent in his choice of materials for construction of the fence.

¶27. The majority erroneously shifts the burden to the Ladniers to prove, by "testimony, exhibits, expert opinions, product warnings, or recognized industry standards," that the field-fence wire was inadequate. Majority opinion at (¶12). As stated, Hester, as the movant, bears the burden of persuasion and production to show that he was not negligent in the choice of fence wire that he used to construct the fence, as it is his responsibility to show that he is entitled to summary judgment as a matter of law. He cannot make that showing without producing uncontradicted evidence showing that he was not negligent. What he produced, via his and Lawrence's depositions, is conflicting evidence on the adequacy of the fence. Given this conflicting evidence, it would have been necessary for Hester to present expert testimony or documentation as to recognized industry standards showing that his fence was properly constructed out of materials suitable for containing a horse as large as Diego. He

failed to do so, and his failure to do so means that he was not entitled to summary judgment, and the Ladniers were not required to produce any rebuttal evidence. For the reasons presented, I dissent. I would reverse and remand this case for a trial on the merits.

LEE, C.J., AND RUSSELL, J., JOIN THIS OPINION.