NO. COA02-227

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

ANGELA G. DICKENS,
Plaintiff

v. Halifax County
No. 01 CvS 747

VALENE STEPHENSON, and
Z. L. DAVENPORT, JR.,
Defendants

Appeal by plaintiff from an order entered 5 November 2001 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 30 October 2002.

The Blount Law Firm, PLLC, by Marvin K. Blount, Jr. and Darren M. Dawson, for plaintiff-appellant.

Broughton Wilkins Sugg Hall & Thompson, PLLC, by R. Palmer Sugg and Benjamin E. Thompson, III, for defendant-appellee Z. L. Davenport, Jr.

HUNTER, Judge.

Angela G. Dickens ("plaintiff") appeals an order granting summary judgment on her negligence claim against Z. L. Davenport, Jr. ("defendant"). We affirm.

Defendant is the father of Valene Davenport Stephenson ("Stephenson"). Without obtaining financial assistance from defendant, Stephenson purchased a 1,000 pound quarter horse on 20 June 1998. Stephenson housed the animal on defendant's farm free

of charge. Defendant never verbally objected or consented to Stephenson's housing the horse on the farm.

Stephenson was responsible for all the horse's veterinarian services and grooming. Defendant did not contribute any money for the horse's upkeep. Furthermore, defendant did not actually feed, water, or otherwise care for the horse other than retrieving food for the animal on four of five occasions that was paid for by Stephenson. Stephenson testified that defendant was incapable of caring for the horse or the farm itself due to the effects of a stroke he had in 1990 and his being almost totally deaf.

On or about 6 September 1998, Stephenson attempted to ride the horse on defendant's farm. On that occasion, the horse bucked as Stephenson tried to mount it. Stephenson fell to the ground and was taken to the hospital for x-rays. Defendant was aware of this incident. Nevertheless, Stephenson continued to ride the horse for many days following her fall without any problems. However, approximately two weeks later, the horse once again refused to allow Stephenson to mount it and ran away before she could climb upon the saddle. Stephenson subsequently decided to sell the horse.

On 1 October 1998, plaintiff met Stephenson at defendant's farm to consider purchasing the horse. Stephenson asked plaintiff if she wanted to ride the horse, to which plaintiff agreed. The horse began to buck and kneel after plaintiff mounted it. Plaintiff fell to the ground, sustaining injuries. Defendant was not present when plaintiff fell and had no knowledge that

Stephenson was attempting to sell the horse or showing it to potential buyers.

Plaintiff filed a complaint on 15 May 2001 against both defendant and Stephenson alleging their negligence for failure to warn or inform her about the horse's dangerous propensities. Plaintiff also alleged that defendant and Stephenson were engaged in the joint enterprise of selling the horse. Thereafter, defendant filed a motion for summary judgment. Plaintiff filed a response to defendant's motion, which was accompanied by the deposition testimony of each party. The Halifax County Superior Court heard defendant's motion on 22 October 2001. After finding no genuine issues of material fact, the court granted summary judgment in defendant's favor in an order filed on 5 November 2001. Plaintiff appeals.

On an appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Thus, when viewing the evidence in the light most favorable to plaintiff, we must determine whether the trial court properly concluded that the movant showed, through pleadings and affidavits, that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). The movant can meet his initial burden by showing either that "an essential element of plaintiff's case did not exist as a matter of law or showing through discovery that plaintiff had

not produced evidence to support an essential element of her claim." *Rorrer v. Cooke*, 313 N.C. 338, 350, 329 S.E.2d 355, 363 (1985). Once this initial burden is met, plaintiff must then produce a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant. *Id.*

In the present case, plaintiff's negligence action against defendant was based on the injuries she incurred from Stephenson's horse. In order to recover for injuries inflicted by such a domestic animal, "a plaintiff must show both '(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits.'" *Joslyn v. Blanchard*, 149 N.C. App. 625, 628-29, 561 S.E.2d 534, 536 (2002) (quoting *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951)). In his brief to this Court, defendant brings forth no arguments disputing plaintiff's contention that the horse was dangerous or had a vicious propensity. Defendant only disputes whether he (I) was the "keeper" of the horse and (II) knew or should have known about the animal's vicious propensity.

I. Keeper

Our Supreme Court has distinguished an "owner" and a "keeper" of an animal as follows:

> The owner of an animal is the person to whom it belongs. The keeper is one who, either with or without the owner's permission, undertakes to manage, control, or care for the

> animal as owners in general are accustomed to do. It is apparent that a keeper may or may not be its owner. "The word 'keep,' as applied to animals, has a peculiar signification. It means 'to tend; to feed; to pasture; to board; to maintain; to supply with necessaries of life.'" *To keep* implies "the exercise of a substantial number of the incidents of ownership by one who, though not the owner, assumes to act in his stead."

Swain v. Tillett, 269 N.C. 46, 51, 152 S.E.2d 297, 302 (1967) (citations omitted). "Thus, liability for injuries inflicted by animals does not depend [solely] upon the ownership of the animal, '"but the keeping and harboring of an animal, knowing it to be vicious."'" *Joslyn*, 149 N.C. App. at 629, 561 S.E.2d at 536 (citations omitted).

Here, plaintiff has failed to meet her burden of showing defendant was the "keeper" of the horse. The evidence failed to establish that defendant managed, controlled, or cared for the animal, especially considering Stephenson's testimony that defendant's stroke in 1990 made it virtually impossible for him to care for any animals or his farm. At most, the evidence showed defendant retrieved food for the horse on several occasions, as well as provided a pasture and housing for the animal. However, these "incidents of ownership" are not substantial enough to assume defendant was acting in his daughter's stead. *See Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

II. Knew or Should Have Known

Plaintiff also argues defendant knew or should have known about the horse's vicious propensity. However, having determined that plaintiff failed to produce evidence supporting the first

essential element of her claim, we decline to address plaintiff's arguments regarding this element.

Accordingly, for the aforementioned reasons, the trial court did not err in granting summary judgment in defendant's favor.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

Report per Rule 30(e).