NO. COA07-451

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2008

JAMES E. BYNUM,
Plaintiff,

v. Wilson County
No. 05 CVS 1774

JOHNNY WHITLEY and
LOIS MARIE BYNUM,
Defendants.

Appeal by Plaintiff from judgment entered 31 October 2006 by Judge W. Russell Duke, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 31 October 2007.

Taylor Law Office, by W. Earl Taylor, Jr., for Plaintiff-Appellant.

Valentine, Adams, Lamar, Murray, Lewis & Daughtry, L.L.P., by Ernie K. Murray and Kevin N. Lewis, for Defendant-Appellee Johnny Whitley.

Hall, Rodgers, Gaylord & Millikan, PLLC, by Jonathan Hall and Kathleen M. Millikan, for Defendant-Appellee Lois Marie Bynum.

STEPHENS, Judge.

This case involves a collision between an automobile and a horse. James E. Bynum ("Plaintiff") was a passenger in the automobile which Plaintiff's wife, Defendant Lois Marie Bynum, was driving. Defendant Johnny Whitley ("Whitley") owned the horse. The case was called for trial 2 October 2006. At the close of Plaintiff's evidence, the trial court directed a verdict in favor

of Plaintiff's wife. At the close of all the evidence, the trial court directed a verdict in favor of Whitley. From the judgment thereupon entered, Plaintiff appeals.

FACTS

Plaintiff commenced this action by filing a complaint against his wife and Whitley. As to his wife, Plaintiff alleged that she was negligent in: (1) failing to keep a proper lookout; (2) failing to keep the automobile under proper control; (3) failing to reduce speed to avoid a collision; and (4) operating the automobile at a speed greater than was reasonable and prudent under the existing conditions. As to Whitley, Plaintiff alleged, *inter alia*, that he was negligent in: (1) allowing the horse to run at large with his knowledge and consent; and (2) allowing the horse to wander at will without restraint.

At trial, Plaintiff offered testimony of State Trooper Richard Westbrook who testified that Mrs. Bynum, driving Plaintiff's truck, collided with the horse around 10:00 p.m. on 6 May 2005. Trooper Westbrook testified that the speed limit on the road where the collision occurred was fifty-five miles per hour and that, based on his conversation with Mrs. Bynum and the damage to the truck, Mrs. Bynum was traveling at a speed of approximately thirty miles per hour at impact. Trooper Westbrook further testified that the road was dark at the scene of the accident, not being illuminated by any street lights or by any lights from surrounding structures.

Mrs. Bynum testified that she was driving forty-five miles per hour when she slowed upon seeing a white horse on the road. After

passing the white horse, she immediately collided with a second horse.

Whitley acknowledged that he owned both the white horse Mrs. Bynum saw and the horse with which Mrs. Bynum collided. Whitley testified that the horses escaped from one of his pens on the night of the accident. The pen from which the horses escaped was surrounded by a four-foot high chain-link fence whose metal poles were sunk approximately one foot into the ground and embedded in concrete. About two months before the accident, Whitley removed barbed wire from the fence intending to install an electric fence. Whitley acknowledged that the purpose of the barbed wire was to discourage animals from trying to push over the fence. The horses escaped before Whitley installed the electric fence by pushing over the fence. Whitley testified that he thought the horses were able to push the fence over because of the high amount of rain that had recently fallen and which had softened the ground around the fence. Finally, Whitley testified that someone passing by informed him that his horses were on the road, and that he immediately went outside to investigate.

Plaintiff testified on his own behalf. On cross-examination, Plaintiff testified as follows:

> Q. When you all were out there that night, would you agree this all happened very fast with the horses?
>
> A. That's right, it happened real fast.
>
> Q. Okay. When you were -- Let me ask you this, do you think your wife did anything wrong when she was driving the car that night?

A. No, sir.

Q. And as far as you could tell was she keeping a lookout for things on the roadway?

A. That's right.

Q. And as far as you could tell was -- did she keep her vehicle under control the whole time?

A. That's right.

Q. As far as you could tell was she going too fast for the conditions out there?

A. No, no.

Q. Would you agree that this was all sudden and unexpected when these horses came into you?

A. It sure was.

. . . .

Q. You don't think this accident was your wife's fault, do you?

A. No.

Two of Whitley's neighbors testified that Whitley's horses were running free of their pen on one occasion over a year before the collision. Neither neighbor knew how the horses had escaped from the pen.

Finally, Whitley's wife testified that a passerby told the Whitleys that a dog was chasing a horse down the road and that Whitley left the house to investigate.

At the close of Plaintiff's evidence, Plaintiff's wife moved for a directed verdict on the ground that Plaintiff's testimony repudiated his claim against her. The trial court granted Mrs. Bynum's motion. After that ruling, Whitley offered testimony of a

Department of Agriculture employee who examined Whitley's fence prior to the accident. The employee testified that the fence "look[ed] adequate." In rebuttal, Plaintiff offered testimony of another of Whitley's neighbors. The neighbor testified that he had seen Whitley's horses out of their pens "once or twice" between a year and a half and two years before the trial. At the close of all the evidence, Whitley moved for a directed verdict on the ground that Plaintiff's evidence was insufficient to support a jury verdict. The trial court granted Whitley's motion and entered judgment 31 October 2006.

DISCUSSION

A motion for directed verdict "ask[s] whether the evidence presented at trial is legally sufficient to take the case to the jury." *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987) (citations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 50 (2005) (providing for the motion). "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving [the non-movant] the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in [the non-movant's] favor." *Taylor*, 320 N.C. at 733-34, 360 S.E.2d at 799. A party seeking a directed verdict bears a heavy burden. *Taylor*, 320 N.C. 729, 360 S.E.2d 796. The burden is particularly heavy in cases in which the principal issue is negligence. *Id.* "Only in exceptional cases is it proper to enter a directed verdict . . . against a plaintiff in a negligence case." *Id.* at 734, 360 S.E.2d at 799.

These same principles apply to our review of a trial court's ruling on a motion for a directed verdict. *Taylor*, 320 N.C. 729, 360 S.E.2d 796; *see also In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999) (stating "questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict . . . present an issue of law") (citing *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 379-81, 329 S.E.2d 333, 343-44 (1985); *but see In re Will of Allen*, 148 N.C. App. 526, 529, 559 S.E.2d 556, 558 (2002) ("The trial court's ruling on a directed verdict motion is addressed to the court's discretion, and will not be overturned absent an abuse of discretion.") (citing *Crist v. Crist*, 145 N.C. App. 418, 550 S.E.2d 260 (2001)).

"A motion for a directed verdict shall state the specific grounds therefor." N.C. Gen. Stat. § 1A-1, Rule 50(a) (2005). In reviewing a trial court's ruling upon a Rule 50(a) motion, "appellate courts will not consider grounds other than those stated at trial[.]" *La Grenade v. Gordon*, 60 N.C. App. 650, 653, 299 S.E.2d 809, 811 (1983) (citing *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981)). In *Feibus*, the trial court directed a verdict in favor of defendants on the ground that plaintiff's claim was barred by "the expiration of a statutory limitation period[.]" *Feibus*, 301 N.C. at 297, 271 S.E.2d at 388. This Court affirmed the trial court's ruling on the ground that plaintiff's evidence was insufficient to take the case to the jury. The Supreme Court reversed, concluding that "the only question properly before the

Court of Appeals with respect to the motion for a directed verdict was whether the grant of the motion could be upheld on the basis of the statute of limitations." *Id.* at 301, 271 S.E.2d at 390.

Plaintiff contends the trial court erred in directing a verdict in favor of his wife. In support of this contention, Plaintiff only generally argues that "sufficient evidence was produced to allow the jury to decide the issue of the negligence of [Mrs. Bynum]." Counsel for Mrs. Bynum acknowledged as much at trial, stating, "I think you can find some evidence of negligence on [Mrs. Bynum's] part if you look at the whole picture." Rather, as stated above, the sole ground advanced by Plaintiff's wife in support of her motion was that the evidence was legally insufficient to take the case to the jury because Plaintiff's own testimony repudiated his claim against her. *See Cogdill v. Scates*, 26 N.C. App. 382, 386, 216 S.E.2d 428, 431 (1975) ("Since [plaintiff] had, by her own explicit and unambiguous testimony, repudiated any cause of action she had previously alleged against her husband, no issues with respect to his liability for her injuries should have been submitted to the jury."), *aff'd*, 290 N.C. 31, 224 S.E.2d 604 (1976).

The judgment plainly states that the trial court directed a verdict in favor of Mrs. Bynum solely on the basis that Plaintiff, by his own testimony, repudiated his claim against his wife. Thus, the only issue properly before this Court on appeal is whether the trial court erred in granting judgment on that basis. *Feibus*, 301

N.C. 294, 271 S.E.2d 385. Plaintiff, however, presents no argument or reason for overturning the basis of the trial court's determination. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Accordingly, the trial court's judgment in favor of Mrs. Bynum is affirmed.

While the basis of the trial court's ruling as to Mrs. Bynum was Plaintiff's repudiation of his complaint's allegations, the basis of the court's ruling as to Whitley was simply sufficiency of the evidence. The judgment plainly states that "Plaintiff failed, as a matter of law, to produce evidence which would support a jury verdict in [his] favor[.]" Plaintiff contends the trial court erred in making this determination. We agree.

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

> 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.

Id. at 576, 9 S.E.2d at 11 (citations omitted). This statement of the law is no less applicable today than it was in 1940. *See*,

e.g., *Garrett v. Overman*, 103 N.C. App. 259, 404 S.E.2d 882 (quoting *Gardner*), *disc. review denied*, 329 N.C. 787, 408 S.E.2d 519 (1991).

In this case, there is no evidence that Whitley's horse was "at large with his knowledge and consent, or at his will[.]" *Gardner*, 217 N.C. at 577, 9 S.E.2d at 12. Both Whitley and his wife offered uncontroverted testimony that, upon receiving information that a horse was being chased down the road, Whitley left his house to investigate. Furthermore, the neighbors' testimony is insufficient to establish that Whitley knew and consented to his horse running at large. *See Kelly v. Willis*, 238 N.C. 637, 78 S.E.2d 711 (1953) (holding that if an animal is *repeatedly* found running at large, the consent and knowledge of the owner may be inferred).

However, the evidence easily suffices to get to the jury on the question of whether Whitley exercised ordinary care and the foresight of a prudent person in keeping the horse in restraint. By Whitley's own testimony, the horses simply pushed over the fence with which Whitley attempted to keep the animals restrained. Whitley testified that the reason the horses were able to push the fence over easily was because it had been raining. While the Department of Agriculture employee testified that the fence "look[ed] adequate," he acknowledged that a fence that "is rendered inadequate just because it rained and got wet . . . [is] an inadequate fence." We conclude, therefore, that the evidence presented at trial, viewed in the light most favorable to

Plaintiff, was legally sufficient to take the case to the jury on the issue of Whitley's negligence. We disagree with Whitley's contention that since there is no evidence that any of his horses had previously escaped from the particular pen, Whitley had no duty to guard against such an eventuality. "The fact that the horse in question had not previously escaped from the pasture does not preclude a finding of breach." *Garrett*, 103 N.C. App. at 263, 404 S.E.2d at 884 (citations omitted). The trial court's judgment in favor of Whitley is reversed.

AFFIRMED IN PART; REVERSED IN PART.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).