IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-293

Filed: 18 October 2016

Vance County, No. 15 CVS 12

CECELIA W. PEOPLES and ERNEST J. ROBINSON, JR., Plaintiffs,

v.

THOMAS H. TUCK, Defendant.

Appeal by Plaintiffs from an order entered 21 October 2015 by Judge Orlando F. Hudson in Vance County Superior Court. Heard in the Court of Appeals 22 September 2016.

Riddle & Brantley, LLP, by Donald J. Dunn and Jonathan M. Smith, for Plaintiff-Appellants.

Bryant & Lewis, P.A. by David O. Lewis, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Cecelia W. Peoples and Ernest J. Robinson, Jr. ("Plaintiffs") appeal following a summary judgment order entered for Thomas H. Tuck ("Defendant"). On appeal, Plaintiffs contend there is a genuine issue of material fact surrounding Defendant's failure to uphold his duty of care, which he owed to them as motorists. After careful review of the record, we hold there is a question in need of jury resolution.

I. Factual and Procedural History

On 12 January 2012, Defendant rode his horse, Molly[1], from his parents' home on Abbott Road to his sister Serena Lawson's home on Bear Pond Road in Vance County, North Carolina. To get to Ms. Lawson's home, Defendant rode Molly on a one mile dirt path, parallel to the road, as he had done twice per week for the two years prior.

When he arrived at his sister's home, Defendant tied Molly's lead line to a four-by-four post, that previously served as a clothesline post, and had a T-shape at its top, which he normally did twice per week. Defendant checked the post and tried to shake it. Satisfied the post was sturdy, Defendant walked into the home and talked to his sister for ten minutes.

Defendant heard a commotion, walked outside, and saw the post was broken at its base. He and his brother-in-law, Billy Joe Lawson, drove a truck one-quarter of a mile down Bear Pond Road and saw a gathering of people and cars. They stopped to look for Molly and saw her lying on the blood-covered road with a broken neck and four broken legs. It appeared Mr. Robinson struck Molly with his Mercury car on Bear Pond Road, with his mother riding in the front passenger seat. The impact killed Molly, caused her to land on the hood and roof of the Mercury, and the weight of her body crushed the roof inwards towards Plaintiffs.

[1] Molly is a "900 to 1,000 pound" black horse, whose "mama was a full-blooded racking horse" and "daddy was a full-blooded walking horse."

Mr. Robinson crawled out of the wrecked vehicle. Defendant became "loud and belligerent" and assaulted Mr. Robinson.[2] Medical responders transported Plaintiffs to UNC hospitals with spinal cord injuries and concussions.

On 6 January 2015, Plaintiffs filed a negligence action against Defendant, alleged Defendant failed to restrain Molly, and raised the doctrine of *res ipsa loquitor*. On 20 February 2015, Defendant answered and pled a lack of proximate cause as a defense and filed a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

On 14 August 2015, Defendant moved for summary judgment pursuant to Rule 56. Defendant contended *res ipsa loquitor* was inapplicable to the case and no genuine issue of material fact existed. He alleged Plaintiffs failed to forecast any evidence showing he failed to secure or restrain Molly, and claimed Plaintiffs could not forecast any evidence showing he breached "any duty of care" owed to them.

On 21 September 2015, Plaintiffs responded and asked the trial court to deny Defendant's motion for summary judgment and attached Plaintiffs' depositions, Defendant's deposition, the responding animal control officer, Jerry Nobles', deposition, an incident report from responding officers, a criminal file in Defendant's criminal assault case, Plaintiff's answers to interrogatories, Defendant's answers to

[2] In a separate criminal action, Defendant was charged with assault. He pled guilty and served ninety days in the Vance County Jail.

interrogatories, and an affidavit from veterinarian Dr. Lauren Taylor. Dr. Taylor's affidavit states the following, in relevant part:

> 3. At the request of the attorneys for the plaintiffs in this action, I reviewed the deposition of Thomas H. Tuck to evaluate whether Mr. Tuck used reasonable care in his care and restraint of the horse he was in charge of which went into the roadway and was struck by a vehicle operated by plaintiff Ernest Robinson.
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> 4. Based on my training, experience and active clinical practice of equine medicine[,] I have knowledge of the demeanor of horses and proper methods of restraint applicable to horses.
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> 5. Based on my review of Mr. Tuck's deposition, it is my opinion that Mr. Tuck failed to properly restrain his horse and as a result thereof his horse was able to break away and get into the roadway causing a collision with Ernest Robinson.
>
> 6. It is further my opinion that Mr. Tuck failed to use reasonable care by tying the horse to a 4 by 4 post in a strange location, unattended, outside of any fenced[-]in area. Under the circumstances as set forth in Mr. Tuck's deposition, the 4 by 4 post used by Mr. Tuck to restrain the horse was not sufficient.

Animal control officer Nobles' deposition states the following in relevant part:

> Q. Had you ever had any complaints about [Defendant] and his care of any of his [horses]?
>
> A. No, sir. . . .
>
> Q. In your work with horses have you had experience with how to tie and restrain horses?
>
> A. Yes.

> Q. And is that something you've been doing for the 11 years that you've been dealing with horses?
>
> A. Yes.
>
> Q. In your—based on your experience and in your opinion do you have an opinion as to whether or not tying a horse such as this to a four by four post is a reasonable means of restraining this size horse?
>
> A. I do have a hitching post at my house, which is made out of four by four post. . . . And I do tie my horse to it. . . .
>
> Q. And if the facts are that it was a four by four clothesline post with a crossbar that was located at five or six feet off the ground, would you have any opinion about whether or not that is a sufficient means of restraining a horse of this size?
>
> A. I really don't have an opinion on that because I've seen horses here in Vance County tied up on a whole lot less.

On 21 September 2015, the trial court heard the parties on Defendant's summary judgment motion. Defendant cited to *Gardner v. Black*, 217 N.C. 573, 9 S.E.2d 10 (1940) and argued the standard of care is whether the person in charge of the animal exercised "ordinary care and foresight of a prudent person to keep [the animal] in a restraint." Defendant claimed a horse owner was not strictly liable if his horse escaped onto a roadway and struck a vehicle. Further, Defendant claimed Dr. Taylor's affidavit was silent on the nature and extent of Molly's training, the nature of Molly's breed, or anything specific to the facts of the case. Defendant contended there was no evidence that Molly escaped from the house before, or that he had any

knowledge of Molly's ability or propensity to escape a hitching post. Plaintiffs' counsel contended Dr. Taylor's affidavit "raises a question of fact that would entitle us to a jury trial in this matter" because it contradicts Defendant's testimony.

The trial court stated, "Well, it's a very close case, but I believe in the Court's discretion that summary judgment is appropriate" and granted Defendant's motion for summary judgment. The trial court entered a written order granting Defendant summary judgment on 21 October 2015. Plaintiffs timely filed notice of appeal on 3 November 2015.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

On appeal, Plaintiffs contend there is a genuine issue of material fact "as to whether Defendant breached [his] duty of ordinary care in restraining his horse." After careful *de novo* review, we agree.

To survive a defendant's motion for summary judgment in a negligence case, a plaintiff must set forth a prima facie case: "(1) that defendant failed to exercise proper

care in the performance of a duty owed [to] plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Strickland v. Doe*, 156 N.C. App. 292, 294, 577 S.E.2d 124, 128 (2003) (internal quotation marks and citations omitted). Normally, summary judgment is not appropriate in negligence actions. *Id.* (citations omitted).

The party seeking summary judgment has the burden of "establishing the lack of any triable issue." *Collingwood v. General Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citing *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975)). The moving party may meet its burden by proving that an essential element of the opposing party's claim is "non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood*, 324 N.C. at 66, 376 S.E.2d at 427 (citations omitted). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id.* (citing *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972)).

The non-moving party may not withstand a summary judgment motion by "simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by [Rule 56(e)], showing that there is a genuine

issue of material fact for trial." *Strickland*, 156 N.C. App. at 294–95, 577 S.E.2d at 128 (citation omitted). Rule 56 allows the non-moving party to set forth specific facts demonstrating a triable issue of fact through "depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances." *Id.*, 156 N.C. App. at 295, 577 S.E.2d at 128 (citations omitted).

To establish a negligence claim against an animal owner, a plaintiff must forecast evidence supporting the essential elements of negligence: duty, breach of duty, proximate cause, and damages. *Thomas v. Weddle*, 167 N.C. App. 283, 286, 605 S.E.2d 244, 246 (2004) (internal quotation marks and citations omitted). "The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant." *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 403, 250 S.E.2d 255, 258 (1979) (citations omitted).

Generally, "the parameters of reasonable foreseeability," in cases involving injuries caused by animals, "will vary according to the breed, species, or known individual temperament of the animal." *Thomas*, 167 N.C. App. at 287, 605 S.E.2d at 247. "Owners of wild beasts, or beasts that are in their nature vicious, are liable under all or most all circumstances for injuries done by them; and in [such actions] it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge . . . ." *State v. Smith*, 156 N.C. 628, 632, 72 S.E.

321, 323 (1911). In cases involving "large domestic animals or certain domestic animals of known danger, the owner or keeper will also be charged with knowledge of the general nature of the species or breed." *Thomas*, 167 N.C. App. at 287, 605 S.E.2d 244, 247 (citing *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979)). For example, this Court has imputed a Rottweiler owner with knowledge of the dog's dangerous propensities because evidence showed the breed to be "very strong, aggressive and temperamental, suspicious of strangers, protective of its space, and unpredictable." *Hill v. Williams*, 144 N.C. App. 45, 55, 547 S.E.2d 472, 478 (2001). However, "not all actions seeking recovery for damage caused by a domestic animal need involve the vicious propensity rule." *Griner*, 43 N.C. App. at 407, 259 S.E.2d at 388).

A horse owner may be imputed with knowledge of a horse's general tendency to kick a small child because horses "'by virtue of their size alone [and] in their normal activities pose a distinct type of threat to small children . . . .'" *Thomas*, 167 N.C. App. at 287, 605 S.E.2d at 247 (quoting *Schwartz v. Erpf Estate*, 255 A.D.2d 35, 39, 688 N.Y.S.2d 55, 59 (1999)); *see Williams v. Tysinger*, 328 N.C. 55, 399 S.E.2d 108 (1991) (holding "the question of defendants' negligence in sending the young boys unsupervised to play with the horse is a question for the jury" because horses, by their nature, pose a risk of kicking a person or inadvertently stepping on a person, which is not readily apparent to young boys). However, in cases where the injury is

caused by an escaped horse, not a horse kicking or stepping on a child, it is "not always essential" to establish the horse owner's knowledge of the animal's dangerous propensities. *See Lloyd v. Bowen*, 170 N.C. 216, 86 S.E 797 (1915). Our Supreme Court defined the following standard of care for such cases, which notably excludes an element regarding the horse's dangerous propensities:

> 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. . . . The doctrine of res ipsa loquitor does not apply.

Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10, 11–12 (1940) (citations omitted).

Here, Plaintiffs need not forecast evidence that Defendant knew of Molly's dangerous propensities. This follows because Plaintiffs are not children who are at a unique risk for being kicked or stepped on. The crux of this action is Defendant's keeping of Molly—whether he exercised reasonable care in hitching Molly at his sister's house, and leaving her unattended in a non-fenced-in area. While *res ipsa loquitor* does not apply to this case, Plaintiffs have provided a forecast of evidence in Dr. Taylor's affidavit that raises this very jury question. *See Strickland.*, 156 N.C. App. at 295, 577 S.E.2d at 128 (citations omitted).

Reviewing the evidence, and taking all inferences therein, in the light most favorable to Plaintiffs, we hold Plaintiffs forecasted evidence that raises a triable issue of fact.

IV. Conclusion

For the foregoing reasons we reverse the trial court.

REVERSED.

Judges McCULLOUGH and DIETZ concur.

Report per Rule 30(e).