IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-293-2

Filed: 19 September 2017

Vance County, No. 15 CVS 12

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

v.

THOMAS H. TUCK, Defendant.

Appeal by Plaintiffs from an order entered 21 October 2015, by Judge Orlando F. Hudson, Jr. in Vance County Superior Court. Originally heard in the Court of Appeals 22 September 2016, with opinion issued 18 October 2016. On 17 August 2017, the Supreme Court allowed Defendant's petition for discretionary review for the purpose of remanding this case to this Court to reconsider its holding in light of *United Community Bank (Georgia) v. Wolfe*, ___ N.C. ___, 799 S.E.2d 269 (2017).

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.

Cecilia W. Peoples and Ernest A. Robinson, Jr. ("Plaintiffs") timely entered notice of appeal following a summary judgment order entered for Thomas H. Tuck

("Defendant"). The Court of Appeals held there was a genuine question in need of jury resolution in an opinion issued 18 October 2016.

On 21 November 2016, Defendant filed a petition for discretionary review with the North Carolina Supreme Court. On 17 August 2017, the North Carolina Supreme Court allowed Defendant's petition for discretionary review for the limited purpose of remanding the case to this Court to reconsider its holding in light of *United Community Bank*.

In our initial opinion, we concluded Plaintiffs forecasted evidence that raised a triable issue of fact regarding whether Defendant exercised reasonable care in hitching his horse, Molly, at his sister's house, at night, and leaving her unattended in a non-fenced-in area. *Peoples v. Tuck*, No. COA16-293, 2016 WL 6081423, at *4 (unpublished) (N.C. Ct. App. October 18, 2016). We determined Plaintiffs presented evidence in Dr. Taylor's affidavit that raised a genuine issue of material fact regarding whether Defendant exercised reasonable care. *Id.* In reconsidering our holding in light of *United Community Bank*, we reach the same conclusion. However, we amend our opinion to state Plaintiffs' evidence presented a genuine issue of material fact, not in Dr. Taylor's affidavit alone, but through the sum of all evidence presented in response to Defendant's motion for summary judgment.

In *United Community Bank*, the Supreme Court determined summary judgment in favor of the plaintiff was proper when the defendant "failed to present

substantial competent evidence to create a genuine issue of material fact." *United Community Bank*, ___ N.C. at ___, 799 S.E.2d at 273. At issue in *United Community Bank* was whether the defendant presented sufficient evidence regarding the "true value" of foreclosed property for the purposes of application of the "anti-deficiency statute." *Id.* at ___, 799 S.E.2d at 270. The defendants' affidavit in opposition to the bank's motion for summary judgment merely "relied on their status as the property owners and their joint affidavit . . . stating that they 'verily believe[ ] that the . . . property sold . . . was at the time of [the foreclosure] sale fairly worth the amount of the debt it secured.'" *Id.* at ___, 799 S.E.2d at 272 (alteration in original).

The court explained "[d]efendants' conclusory statement without any supporting facts is insufficient to create a genuine issue of material fact." *Id.* In addition, the court emphasized "merely reciting the statutory language or asserting an unsubstantiated opinion regarding the foreclosed property's value is insufficient." *Id.* at ___, 799 S.E.2d at 273. Thus, the court held summary judgment for the plaintiff was proper. *Id.*

In the case at issue before this Court, Plaintiffs did not merely rely on conclusory statements, but rather included substantial facts demonstrating Defendant breached his duty of ordinary care. In response to Defendant's motion for summary judgment, Plaintiffs attached Plaintiffs' depositions, Defendant's deposition, the responding animal control officer, Frankie 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 interrogatories, and an affidavit from veterinarian Dr. Lauren Taylor. At the hearing on Defendant's summary judgment motion, Plaintiff contended Dr. Taylor's affidavit "raises a question of fact that would entitle us to a jury trial in this matter."

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.
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> 6. It is further my opinion that Mr. Tuck failed to use reasonable care by tying the horse to a [four] by [four] post in a strange location, unattended, outside of any fenced[-]in area. Under the circumstances as set forth in Mr. Tuck's deposition, the [four] by [four] post used by Mr. Tuck to restrain the horse was not sufficient.

Dr. Taylor's affidavit does not present mere conclusory statements, but rather is supported by facts describing Defendant's conduct that raise a genuine issue regarding the reasonableness of Defendant's actions. Particularly, Dr. Taylor asserts Defendant's method of "tying the horse to a [four] by [four] post in a strange location, unattended, outside of any fenced[-]in area" breached the duty of reasonable care owed to Plaintiffs. These facts present a triable question of fact for the jury to determine whether Defendant's actions were reasonable.

Dr. Taylor's opinion is sufficient to create a question of fact regarding Defendant's reasonableness. "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). This Court has held "[a]n expert need not testify from personal knowledge, as long as the basis for his or her opinion is available in the record or available upon demand." *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E.2d 619, 620-21 (1985).

Here, Dr. Taylor's specialized knowledge of the demeanor of horses and proper methods of restraint applicable to horses will assist the trier of fact in understanding whether Defendant's actions were reasonable. Dr. Taylor's opinion is based on

Defendant's deposition, which is included in the record along with a summary of Dr. Taylor's opinion.

We do not rely solely on Dr. Taylor's affidavit in determining there is a triable issue of fact. Rather, the other evidence presented in response to Defendant's motion for summary judgment is sufficient to raise a genuine issue of material fact. The evidence viewed in the light most favorable to Plaintiffs tends to show the following: Defendant estimated Molly to weigh at least 900 to 1,000 pounds. When Defendant arrived at his sister's home he tied the horse around a treated four by four post concreted in the ground. To secure the horse to the post he "took the reins off and put them around the horn [of the saddle] and tied the lead line that was up under her arm on the halter around the pole." He tied the rope in a slip knot and then "in another little knot." Defendant left the bit in the horse's mouth. Defendant left the horse unattended for five to eight minutes while he was inside the house. During that time, the horse fled, breaking the post off at the bottom. Thereafter Plaintiffs' car collided with the horse, resulting in Plaintiffs suffering physical injury including spinal cord injuries and concussions. The incident occurred when "[i]t was just starting to turn dusk;" around 5:00 to 5:30 in January.

Our review of the evidence reveals a genuine issue of material fact as to whether a reasonably prudent person would secure a 1,000 pound horse to a four by four post and leave it unattended in a non-fenced-in area at nightfall. The evidence

taken in the light most favorable to Plaintiffs is such relevant evidence as a reasonable mind could accept as adequate to support the conclusion Defendant was negligent in his method of restraining the horse and leaving it unattended.

Importantly, "[n]egligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983). "[I]t is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court." *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 473-74, 251 S.E.2d 419, 424 (1979). "Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982).

Therefore, in reconsidering our holding in light of *United Community Bank*, we hold Plaintiffs forecasted evidence that raises a triable issue of fact as to whether Defendant exercised reasonable care. For the foregoing reasons we reverse the trial court.

REVERSED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).