In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00427-CV

JAMIE CENICEROS, APPELLANT

V.

PAUL PLETCHER, APPELLEE

On Appeal from the 223rd District Court
Gray County, Texas
Trial Court No. 35,249; Honorable Phil N. Vanderpool, Presiding

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June 29, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and HANCOCK and PIRTLE, JJ.[1]

Appellant, Jamie Ceniceros, appeals from a take-nothing judgment issued in favor of Appellee, Paul Pletcher, following the granting of his motion for summary judgment in her negligence/gross negligence cause of action. To the extent that Ceniceros's claims or causes of action can be construed as seeking recovery of

[1] Justice Mackey K. Hancock, retired, not participating.

exemplary damages for gross negligence, we affirm the trial court's order granting summary judgment. In all other respects, we reverse the trial court's judgment and we remand this case to the trial court for further proceedings consistent with this opinion.

In support of her appeal, Ceniceros asserts the trial court erred by (1) granting Pletcher's motion to exclude and/or strike the testimony of her expert witness, Bob Kingsbery, (2) granting Pletcher's objections to her response based on the timeliness of its filing and denying her motion for leave to file a late response, and (3) granting Pletcher's traditional and no-evidence motion for summary judgment. Logic dictates that we initially address Ceniceros's second issue before we move on to address her first and third issues.

PROCEDURAL BACKGROUND

On May 23, 2008, Ceniceros was driving on Farm-To-Market Road 749, near Mile Marker 82, in Gray County, Texas, at night, when she struck a black cow that was roaming at large. In July of that year, she filed an original petition alleging Pletcher, the cow's owner, was liable under the theories of negligence, gross negligence, and negligence *per se*. Pletcher filed a general denial and asserted several defenses to Ceniceros's claims, including a claim that "a mere violation of [Gray County's] stock law[2] [was] not negligence *per se*."[3]

[2] Texas courts have relied on local stock laws to hold or assume that livestock owners may be held liable for negligence if their animals stray onto roadways in districts where local stock laws have been passed. *See Gibbs v. Jackson,* 990 S.W.2d 745, 748-49 (Tex. 1999).

[3] In her summary judgment response, Ceniceros has candidly agreed with Pletcher that she does not have a cause of action for negligence *per se*.

Almost four years after suit was filed, on May 11, 2012, Pletcher filed a hybrid traditional and no-evidence motion for summary judgment asserting there was no evidence that he committed any act or omission that caused Ceniceros's injuries. He asserted that the Gray County stock law was insufficient to impose negligence *per se* liability and that the mere presence of livestock on a highway does not create a presumption that the owner was negligent. On May 12, the trial court sent a letter to counsel for both parties setting Pletcher's motion for summary judgment "for hearing BY SUBMISSION on Tuesday, June 28, 2012."

On September 7, 2012, Ceniceros filed a response to Pletcher's motion which included the following written documents: (1) a report entitled *Analysis of the Adequacy of Fencing Regarding Incident on May 23, 2008,* prepared by Kingsbery, (2) the sworn affidavit of Kingsbery, including his report and *curriculum vitae*, (3) a copy of Pletcher's oral deposition testimony, and (4) an unsworn copy of the *Texas Peace Officer's Crash Report.* On September 18, Pletcher filed an objection and reply to Ceniceros's response, asserting it was untimely and should be stricken in its entirety because she failed to seek leave of the court to file it. He further asserted that Kingsbery's report and affidavit, as well as the accident report, were unauthenticated hearsay. By way of response, he further contended Ceniceros had failed to raise a fact issue as to the essential elements of her claim. That same day, Pletcher filed a motion to exclude and/or strike the affidavit and report of Kingsbery on the basis that he was not qualified to give his proffered opinion and that his testimony was conclusory and lacking in factual support. Ceniceros responded to Pletcher's motion to exclude on November 13, 2012.

On February 19, 2013, Pletcher supplemented his traditional and no-evidence motion for summary judgment by asserting, for the first time, that Gray County's stock law was invalid. On February 21, the trial court issued a new order setting the original and supplemental motions for summary judgment for hearing "by submission only" on March 21, 2013. Seven days prior to that submission date, on March 14, Ceniceros filed a response asking the court to deny both the original motion for summary judgment and the supplement.

More than two years after that, on October 19, 2015, the trial court set Pletcher's motion to exclude and/or strike Kingsbery's testimony for a hearing "by submission only" on October 27. The letter advising counsel of the submission date specifically permitted both parties to supplement their pleadings. At the same time, the trial court indicated that it would issue its ruling on the motion to exclude and/or strike Kingsbery's testimony "simultaneously" with its ruling on Pletcher's original and supplemental motions for summary judgment.

On October 26, 2015, Ceniceros filed her motion for leave of court for the late filing of her September 7, 2012 response to Pletcher's original motion for summary judgment. In that motion, Ceniceros's counsel asserted by affidavit that the response was not filed until that date due to a miscommunication in his office. On October 27, Ceniceros filed a supplemental response to Pletcher's motion to exclude and/or strike Kingsbery's testimony, and on October 29, Pletcher requested a formal hearing on that motion.

On November 2, without conducting a formal hearing on any of the pending motions, the trial court issued four orders: one, denying Ceniceros's motion for leave of court for the late filing of her response to Pletcher's motion for summary judgment; another, granting Pletcher's motion to exclude and/or strike Kingsbery's testimony; another, granting Pletcher's objections to three of the four exhibits attached to Ceniceros's response to his motion for summary judgment; and, a final order, granting Pletcher's traditional and no-evidence motion for summary judgment, as well as his supplement to that motion. Simultaneous with the issuance of these four orders, the trial court entered a "take-nothing" judgment in Pletcher's favor. This appeal followed.

ISSUE TWO—TIMELINESS OF CENICEROS'S RESPONSE

By her second issue, Ceniceros asserts the trial court erred by denying her motion for leave to file a late response and by granting Pletcher's objections to her response based on the untimeliness because (1) the objection to the timeliness of her response became moot when the trial court reset the submission date and (2) Pletcher waived any objection to the late filing when he filed his supplement to the original motion. We agree the trial court erred by denying her motion for leave to file a late response and by granting Pletcher's objections to her response based on untimeliness.

In the context of an objection to the timeliness of a summary judgment response, the trial court's rulings are reviewed under an abuse of discretion standard. *Crooks v. Moses*, 138 S.W.3d 629, 635 (Tex. App.—Dallas 2004, no pet.). An abuse of discretion exists when a court's decision is arbitrary or unreasonable. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 242 (Tex. 1985).

Here, Pletcher's motion for summary judgment was originally set for submission on June 28, 2012. At that time, the trial court took no action on the motion. Ceniceros later filed a response and Pletcher filed an objection to that response, contending, in part, that the response was untimely filed. Pletcher also subsequently filed a supplement to his summary judgment motion and obtained a new submission date for March 21, 2015. By setting a new submission date without first ruling on Pletcher's pending objection to Ceniceros's response, the trial court reopened the time frame for filing a response, thereby rendering moot Pletcher's objection to timeliness of the original response. *See Glover v. Berleth*, No. 01-09-00679-CV, 2012 Tex. App. LEXIS 274, at *10 (Tex. App.—Houston [1st Dist.] Jan. 12, 2012, no pet.) (finding that once an original summary judgment hearing date is rescheduled, the non-moving party has "seven days before the rescheduled hearing—to file a response"). Because the objection based on timeliness was moot, the trial court abused its discretion and, therefore, erred by granting Pletcher's objections to her response based on untimeliness.

Having determined the trial court erred, we pretermit discussion of (1) whether Pletcher's objection to the late filing of that response was waived when he filed supplements to his original motion for summary judgment and (2) whether the trial court erred by denying Ceniceros's motion for leave to file a late response. *See* TEX. R. APP. P. 47.1. Issue two is sustained.

ISSUE ONE—STRIKING THE TESTIMONY OF CENICEROS'S EXPERT WITNESS

By her first issue, Ceniceros asserts the trial court erred by striking the testimony of her expert—Bob Kingsbery. Ceniceros contends Kingsbery is imminently qualified to

issue an opinion on whether Pletcher negligently maintained his fence at the time of Ceniceros's accident because he (1) was raised on a ranch and personally began building barbed wire fences at fourteen years of age, (2) supervised barbed wire fencing installations at age seventeen, (3) earned a degree in agricultural journalism at Texas A&M University, (4) worked as a marketing manager at Gallagher/Snell, Inc. (the U.S. distributor of a world-wide livestock fencing company) for eight years during which he conducted training seminars on the effective use of barbed wire fences, (5) traveled internationally to learn alternative methods of livestock containment techniques, (6) collaborated with manufacturers of barbed wire fencing products to enhance the effectiveness of barbed wire fencing, (7) designed grazing management systems for livestock using all types of fencing techniques, (8) formed Kingsbery International in 1988 to market livestock fencing worldwide, (9) conducted more than 300 seminars in fencing technology for livestock producers in the western hemisphere, (10) authored two books and published more than 100 articles about livestock fencing, (11) has been interviewed for numerous articles related to livestock containment, (12) consulted with several barbed wire fencing manufacturers regarding the proper installation of barbed wire fencing, (13) currently serves as the international sales manager for Dare Products, a leading fence equipment manufacturer, (14) is currently a member of the Animal Behavior Society, (15) has investigated hundreds of incidents of escaped livestock with the majority involving barbed wire fences, (16) qualified as an expert witness in five states, including Texas, and (17) has served as consultant in an additional twenty states. Pletcher asserts Kingsbery is not qualified in the area of cattle behavior and containment. He also asserts Kingsbery's testimony is conclusory and unreliable

because he inspected Pletcher's fence two years after the accident and then opined that Pletcher was negligent in allowing his fence and cattle guard to fall into disrepair at the time of the accident.

Rulings concerning the admission or exclusion of summary judgment evidence are reviewed under an abuse of discretion standard. *Barraza v. Eureka Co*., 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied) (citing *Ho v. University of Texas at Arlington*, 984 S.W.2d 672, 680 (Tex. App.—Amarillo 1998, pet. denied)). An abuse of discretion exists when a court's decision is arbitrary or unreasonable. *Downer,* 701 S.W.2d at 242.

An expert witness may testify regarding "scientific, technical, or other specialized" matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation. TEX. R. EVID. 702. *See Mack Trucks v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006). In determining whether expert testimony is reliable, a court should examine "the principles, research, and methodology underlying the expert's conclusions." *Id.* (citing *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002)). In assessing the admissibility of expert testimony, we do not focus on the correctness of the expert's opinion but on the reliability of the analysis the expert used in reaching his conclusions. *Gross v. Burt*, 149 S.W.3d 213, 237 (Tex. App.—Fort Worth 2004, pet. denied) (op. on reh'g).

Having reviewed Kingsbery's *curriculum vitae*, affidavit, and report, we find that he was qualified to inspect Pletcher's barbed wire fence, take measurements, and opine, based on his experience, whether Pletcher was negligent in allowing his fence to

contain gaps or fall into a state of disrepair sufficient to allow a cow to escape at the time of the accident. *See In re Commitment of Bohannan,* 388 S.W.3d 296, 307 (Tex. 2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 2746, 186 L. Ed. 2d 202 (2013) (holding trial court abused its discretion in excluding expert testimony and noting "[t]he trial court's discretion in determining whether an expert is qualified to testify on a matter is broad but not unbounded"). *See also Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 719 (Tex. 1998) (holding trial court abused its discretion in holding expert was not qualified to testify concerning restraint system in claimant's vehicle). Although Kingsbery inspected Pletcher's fence two years after the accident, in addition to relying on his inspection and experience, he also relied on Pletcher's deposition testimony wherein Pletcher testified that the fence was in same condition it had been in two years earlier with the exception that he repaired that portion of the fence where the cow had escaped. Furthermore, Kingsbery relied on photographs and videos of Pletcher's fence taken by Ceniceros's family the morning after the accident.

Pletcher also testified on deposition that he had cattle escape ten or twelve times over a ten year period. He testified that the morning after the accident, he identified the place in the fence where the cow had escaped and drew a diagram of the location as a deposition exhibit. He also testified his cattle had escaped in the past through the cattle guard and by forcing the fence—both conditions noted by Kingsbery. He also testified that he was not doing anything different with regard to his fencing in the area of the accident and he "had no troubles at all. Just that particular cow."

Having found Kingsbery to be qualified as an expert in this case, we find there was sufficient evidence in the record to support the reliability of his opinion and that his

opinion was relevant to an important issue, i.e., whether a fact issue existed concerning whether Pletcher was negligent in the care or maintenance of his fence at the time of the accident. Accordingly, we find that the trial court abused its discretion in granting Pletcher's motion to exclude and/or strike the testimony of Ceniceros's expert. *See State v. Cent. Expressway Sign Assocs.,* 302 S.W.3d 866, 874 (Tex. 2009) (finding testimony of expert witness reflected an acceptable and reliable method of valuation and it should not have been excluded). Issue one is sustained.

ISSUE THREE—GRANTING SUMMARY JUDGMENT

Finally, by her third issue, Ceniceros asserts the trial court erred by granting summary judgment in Pletcher's favor because material issues of fact existed regarding whether Pletcher owed her a duty to maintain his fences in order to ensure that his cattle did not roam at large, thereby allowing a cow to stray onto the farm-to-market road being used by Ceniceros at the time of the accident, ultimately resulting in her injuries. Pletcher contends (1) he owed no duty to Ceniceros because Gray County's stock law is void and (2) Kingsbery's expert report fails to create a material issue of fact concerning whether Pletcher's negligence, if any, caused Ceniceros's injuries.

STANDARD OF REVIEW

It is not the function of a summary judgment motion to deprive a litigant of her right to a full hearing on the merits of any real issue; but, instead, to promote the "just, speedy, and inexpensive determination of every action," by "eliminating patently unmeritorious claims and untenable defenses." *See Huckabee v. Time Warner Entm't Co.,* 19 S.W.3d 413, 421 (Tex. 2000). *See also Burchinal v. PJ Trailers-Seminole Mgmt. Co.*, 372 S.W.3d 200, 207 (Tex. App.—Texarkana 2012, no pet.). We review a

grant of summary judgment *de novo*. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015).

In a traditional summary judgment motion, a defendant who conclusively negates at least one essential element of the plaintiff's cause of action or conclusively establishes all the elements of an affirmative defense is entitled to summary judgment. TEX. R. CIV. P. 166a(c); *Bradshaw*, 457 S.W.3d at 79 (citing *Nail v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013)). In a no-evidence summary judgment motion, the movant contends that no evidence supports one or more essential elements of a claim or cause of action for which the nonmovant would bear the burden of proof at trial. TEX. R. CIV. P. 166a(i); *Bradshaw*, 457 S.W.3d at 79. In such instances, the trial court must grant the no-evidence motion unless the nonmovant raises a genuine issue of material fact on each challenged element. *Id.* (citing *Hamilton v. Wilson,* 249 S.W.3d 425, 426 (Tex. 2008)). In conducting our analysis, we must take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Thus, a no-evidence motion for summary judgment is improperly granted if the nonmovant brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.* (quoting *Merrell Dow Pharms., Inc. v. Havner,* 953 S.W.2d 706, 711 (Tex. 1997)). Less than a scintilla of evidence exists when the evidence is "so

weak as to do no more than create a mere surmise or suspicion" of a fact. *Id.* (quoting *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983)). When, as here, the order granting summary judgment fails to specify the grounds relied upon by the trial court for its ruling, we must affirm the judgment if any of the grounds advanced are meritorious. *Provident Life and Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 216 (Tex. 2003); *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993); *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

NEGLIGENCE

The common law doctrine of negligence consists of three elements: (1) a legal duty owed to one person by another, (2) a breach of that duty, and (3) damages proximately resulting from the breach. *Helbing v. Hunt*, 402 S.W.3d 699, 702 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)). Here, Pletcher's summary judgment motion attacks all three elements.

DUTY—GRAY COUNTY'S STOCK LAW

A duty is "a legally enforceable obligation to conform to a particular standard of conduct." *Id.* (quoting *Hand v. Dean Witter Reynolds, Inc.*, 889 S.W.2d 483, 491 (Tex. App.—Houston [14th Dist.] 1994, writ denied)). Whether to impose a duty under certain circumstances is generally a question of law. *Id.* (citing *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996)). Here, Ceniceros relies on a stock law enacted in Gray County in 1930 to impose a duty that Pletcher be non-negligent in ensuring that his cattle did not run at large, specifically including a duty to see that his cattle not wander onto Farm-To-

Market Road 749 adjacent to his property. Pletcher, on the other hand, contends that he owed no duty, as a matter of law, because that stock law was invalid.

In Texas, there is no common law duty for an owner of livestock to ensure that his animals do not roam at large, including straying onto farm-to-market roadways. *See Gibbs v. Jackson,* 990 S.W.2d 745, 747 (Tex. 1999). However, under the Texas Agricultural Code, a local "stock law" created by an election may limit a livestock owner's ability to allow his animals to do so. *See generally* TEX. AGRIC. CODE ANN. §§ 143.021-.108 (West 2004 and West Supp. 2016) (pertaining to range restrictions and local option elections to limit or prevent certain animals from running at large).

In 1930, fifty Gray County landowners filed a petition with the Gray County Commissioners' Court, seeking a local option election, pursuant to article 6954 of the Texas Revised Civil Statutes.[4] *See* Act of July 18, 1929, 41st Leg., T.C.S., ch. 8, § 1, 1929 Tex. Gen. Laws 240, 241 (hereinafter the "1929 law"). The petition requested the court to order an election "to determine whether horses, mules, jacks, jennets, and cattle shall be permitted to run at large within the territorial limits of the political

[4] At the time of the local option election, article 6954, Revised Civil Statutes of Texas, provided, in part, as follows:

> upon the petition of fifty freeholders of any such subdivision of a county as may be described in the petition, and defined by the Commissioners' Court of any of the above named counties [including Gray County], Commissioners' Court of said county shall order an election to be held in such county or such subdivision of a county as may be described in the petition and defined by the Commissioners' Court of the day named in the order for the purpose of enabling the freeholders of such county or such subdivision of a county as may be described in the petition and defined by the Commissioners' Court to determine whether horses, mules, jacks, jennets, and *cattle* shall be permitted to run at large in such county or such subdivision of a county as may be described in the petition and defined by the Commissioners' Court.

(Emphasis added). The provisions of article 6954, as amended, have been recodified at TEX. AGRIC. CODE ANN. § 143.071(a) (West 2004).

subdivision of Gray County, known as Justice Precinct No. 2." The court approved the petition and ordered an election to be held on March 18, 1930. It later certified the results of that election and declared that the vote of the people was "in favor of preventing such class of animals from running at large in such district, which is to say, in favor of the stock law in such district." *See* Gray County Commissioners' Court Minutes, Vol. 3, p.p. 40, 41, 46. In counties that have adopted local stock laws, an owner of livestock may not permit his livestock to run at large. *See Gibbs*, 990 S.W.2d at 747-50.

Therefore, unless otherwise modified, changed, or rendered inapplicable, the approved stock law required Pletcher to prevent his cattle from running at large, thereby creating a statutory duty for him to non-negligently maintain suitable fencing. That is to say, if the stock law remained applicable, Pletcher could be liable for negligence if a fact finder were to determine that he breached that duty. *See Rodriguez v. Sandhill Cattle Co., L.P.*, 427 S.W.3d 507, 508-10 (Tex. App.—Amarillo 2014, no pet.). *See also Kennamer v. Estate of Noblitt*, 332 S.W.3d 559, 563 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("Any duty to restrain livestock is statutory.").

No one disputes whether the Gray County stock law met the applicable statutory requirements in effect at the time of the 1930 election. Nor does anyone question whether the petition enacted applied to the location where Pletcher's cattle operations were being conducted at the accident in question. Rather, Pletcher asserts the 1930 election was rendered invalid *ex post facto* because the election petition did not comply with an amendment to the 1929 law passed in 1953. *See* Act of May 22, 1953, 53rd Leg., R.S., ch. 318, §§ 1, 2, 3, 1953 Tex. Gen. Laws 789-90 (hereinafter the "1953

amendment"). In addition to amending article 6954, the 1953 amendment also amended article 6930 of the Texas Revised Civil Statutes (now recodified at TEX. AGRIC. CODE ANN. § 143.021 (West Supp. 2016)). The 1953 amendment divided the classes of animals subject to a local option stock law election into two classes: (1) horses, mules, jacks, jennets, donkeys, hogs, sheep, and goats—to be covered by article 6930, as amended, and (2) cattle—to be covered by article 6954, as amended. *See* Act of May 22, 1953, 53rd Leg., R.S., ch. 318, §§ 1, 2, 1953 Tex. Gen. Laws 789-90.

In support of his position that the 1953 amendment invalidated the 1930 election, Pletcher cites an Attorney General's opinion issued in 2003. *See* Tex. Att'y Gen. Op. No. GA-0093 (2003); 2003 Tex. AG LEXIS 7111. That opinion interprets the statutory amendment made in 1953 to find that a local option election held in Gonzales County in 2002, did not comply with that amendment. *Id.* Specifically, the Attorney General opined that a "local option stock law election, in which a single ballot proposition combines proposals from a petition to restrain cattle [pursuant to article 6954] and from a petition to restrain horses and other animals [pursuant to article 6930], is invalid." *Id.* at *12. Pletcher cites no legal authority for the proposition that the 1953 amendment invalidated a stock law election held at a time when the election in question was in compliance with the law in effect at the time of that election. *Cf. Cutrer v. Cutrer*, 162 Tex. 166, 345 S.W.2d 513, 517 (1961) (applying statute in effect when a document is executed to the construction of that document). The ballot Gonzales County used in its local option stock law election was invalid because the single proposition (1) did not conform to the petitions, (2) combined separate and distinct propositions (combining a petition to restrain cattle with a petition to restrain horses and other animals), and (3)

failed to follow mandatory ballot language. As such, the facts of this case are clearly distinguishable from those involved in the 2003 Attorney General's opinion regarding the 2002 Gonzales County stock law election. Furthermore, we note the Legislature did not provide that the 1953 amendment be applied retroactively. To the contrary, it specifically provided that the amendment would "take effect and be in force from and *after* its passage . . . ." *See* Act of May 22, 1953, 53rd Leg., R.S., ch. 318, § 3, 1953 Tex. Gen. Laws 789, 790. (Emphasis added).

While we do give attorney general opinions due consideration, they are not binding on this court. *Pack v. Crossroads, Inc.,* 53 S.W.3d 492, 504 (Tex. App.—Fort Worth 2001, pet. denied). Because the Attorney General's opinion does not pertain to a local option stock law election conducted in compliance with the law in effect at the time of that election, we find it to be unpersuasive as authority for the invalidation of the 1930 Gray County election. As such, we find the 1930 Gray County stock law to be valid and applicable to the facts of this case. Accordingly, there was at least a scintilla of evidence that Pletcher had a statutory duty to restrain his cattle. *See Rodriguez*, 427 S.W.3d at 508-10. As such, granting summary judgment in favor of Pletcher on the basis of his claim of no duty would be inappropriate. *See Helbing*, 402 S.W.3d at 703.

BREACH OF DUTY AND CAUSE-IN-FACT—CENICEROS'S EXPERT

In a negligence cause of action, a plaintiff must plead and prove her injuries were proximately caused by the defendant's negligence. *Barraza*, 25 S.W.3d at 232. Proximate cause consists of cause-in-fact and foreseeability. *Id.* (citing *Leitch v. Hornsby*, 935 S.W.2d 114, 118-19 (Tex. 1996)); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975). The foreseeability of an event is judged according to a

reasonable person standard. *Leitch*, 935 S.W.2d 119. Therefore, in the context of this case, the foreseeability component of proximate cause is a question whether a reasonable person would have foreseen that a cow, known to be "trouble," could escape its enclosure, if the fences were negligently maintained, and stray onto a public highway where it might be involved in a collision with a motor vehicle? Based on the undisputed facts in this case, we believe the foreseeability component was satisfied.

As to the cause-in-fact component, Ceniceros contends Pletcher breached his duty to properly maintain his fencing, thereby allowing one of his cows to wander onto the farm-to-market road, at night, where she collided with that cow, resulting in her injuries. She contends Kingsbery's summary judgment evidence raised a material question of fact concerning Pletcher's duty to properly maintain his fences and a breach of that duty sufficient to defeat Pletcher's hybrid motion for both a traditional and no-evidence summary judgment. In response, Pletcher contends Kingsbery's opinions were based on mere possibilities, speculation, or surmise. We agree with Ceniceros's contentions and disagree with Pletcher's contentions.

Kingbery's opinion that the condition of Pletcher's fence proximately caused Ceniceros's injury was based on (1) photographs and a video taken by Ceniceros's family of Pletcher's fence the morning after the accident, (2) Pletcher's deposition in 2009 wherein he testified that his fence was in the same condition it had been two years earlier, and (3) Kingsbery's own inspection of that fence. Based on that investigation, Pletcher observed that (1) the top wire of Pletcher's fence was two to four inches lower in several locations than it should have been, (2) several "T" posts were bent resulting in loose fence wires, (3) there were gaps of twenty-four inches between some wires, (4)

there were gaps between wires of twelve inches or more permitting cattle to stick their heads through the fence, (5) a portion of the fence was in poor condition with only four loose strands of barbed wire, (6) the cattle guard was completely filled in with soil rendering it incapable of stopping cattle from escaping, (7) the gate had a twenty-four inch gap between the bottom rail and the top of the cattle guard which was wide enough to allow cattle to escape, and (8) there was a large triangle-shaped gap on the hinged side of the gate that was fifty-five inches tall and fifty-seven inches wide.

In his opinion, based on his investigation and the foregoing observations, Kingsbery opined that Pletcher was negligent in the care of his fence as required by the Gray County stock law and standards of the cattle industry concerning the containment of cattle and that this negligence proximately caused Ceniceros's collision with a cow thereby allowed to roam at large. Having found that Ceniceros produced sufficient evidence that Pletcher had a duty to be non-negligent in his fencing, we also find that Kingsbery's evidence represents more than a scintilla of evidence raising a genuine issue of material fact as to cause-in-fact. Accordingly, we sustain Ceniceros's third issue regarding her action for negligence and reverse the trial court's decision to grant summary judgment as to her negligence claim.

GROSS NEGLIGENCE

In a negligence cause of action, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from gross negligence. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a)(3) (West 2015). Gross negligence consists of both objective and subjective elements. *See Lee Lewis Constr., Inc. v. Harrison*, 70

S.W.3d 778, 785 (Tex. 2001). In order to recover damages for gross negligence, a plaintiff must prove by clear and convincing evidence that (1) when viewed objectively from the defendant's standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and (2) the defendant had actual subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11) (West Supp. 2016). *See also State v. Shumate*, 199 S.W.3d 279, 287 (Tex. 2006). "'Clear and convincing' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(2) (West Supp. 2016). Having examined the entire record *de novo,* we find that Ceniceros produced insufficient evidence to create a genuine issue of material fact regarding whether Pletcher was grossly negligent. Therefore, to the extent that Ceniceros seeks recovery of exemplary damages for gross negligence, that portion of her third issue is overruled.

CONCLUSION

To the extent that Appellant's claims or causes of action can be construed as seeking recovery of exemplary damages for gross negligence, we affirm the trial court's order granting summary judgment. In all other respects, we reverse the trial court's orders and remand this case to the trial court for further proceedings consistent with this opinion.

Patrick A. Pirtle
Justice