IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RONALD W. MOE, Respondent, v. GARY D. GRABER and JANE DOE GRABER, husband and wife and the marital community composed thereof Appellants, JOHN DOES and JANE DOES 1 through 10, Defendants.	)	No. 64829-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 25, 2011

Appelwick, J. — Moe crashed into a cow wandering free on the highway late at night. He sued the owner of the cow, Graber, for negligence in failing to prevent the cow's escape. At a bench trial, the trial court found Graber negligent and that the negligence proximately caused Moe's damages. Graber appeals, arguing that the trial court erred in finding Graber negligent and in allocating only 15 percent of the fault to Moe. Graber also alleges that the trial court erred in failing to allocate fault or segregate damages to an alleged unknown actor who opened the gates to permit the cow to escape. Finding no error, we affirm.

FACTS

Ronald Moe was driving home one night when he crashed into a cow[1] wandering free on State Route 530 near Oso, Washington. The cow was owned by Gary Graber, a rancher who owned the property alongside the highway. At least two sets of two gates prevented cows from leaving the interior corral and entering the roadway. Both sets of two gates were open the night of the collision. The responding officer testified that he followed a trail of blood and cow feces from the scene of the accident to an open set of gates, confirmed that the cows were in the pasture, and secured the gates with twine he found on the ground.[2] Gary Graber testified that he always closed the gates before leaving the property.

Moe sued Graber and his wife for negligence.[3,4] After a three day bench trial, the trial court found Graber 85 percent at fault and Moe 15 percent at fault for Moe's damages. The trial court did not consider or assign fault to the unknown person who allegedly opened the gates to permit the cow to escape the ranch. Graber appeals.

DISCUSSION

I. Negligence of Graber

[1] The parties disputed at trial whether one cow or several cows were on the highway that night.

[2] The parties dispute whether the cows escaped through the open gates or from some other location, such as through a broken fence or a neighbor's farm.

[3] We use "Grabber" to refer to Mr. Graber, Mrs. Graber, and their marital community.

[4] Moe's complaint also alleged a cause of action against Graber under a different set of facts for a separate plaintiff, James Pilon. The trial court granted Graber's motion to sever. The trial court excluded evidence of Pilon's collision and did not consider it here.

Graber alleges that the trial court erred in finding that he was an absentee owner who failed to exercise reasonable care.[5]

Where the findings of fact and conclusions of law are challenged, we limit our review to determining whether substantial evidence supports the findings and whether those findings, in turn, support the legal conclusions. Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc., 102 Wn. App. 422, 425, 10 P.3d 417 (2000). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. Id. Credibility determinations are not subject to appellate review. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990) (an appellate court will not substitute its judgment for the trial court's evaluation of the credibility of witnesses). In evaluating the persuasiveness of the evidence and the credibility of witnesses, we must defer to the trier of fact. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

A. Findings of Fact 10, 15, and 19

[5] Although Graber assigns of error to several findings of fact and conclusions of law, the only argument states, "The trial court erred by finding that Gary Graber was an absentee owner who failed to exercise reasonable care." Also, Graber does not raise this in an issue statement as required RAP 10.3(a)(4). It is unclear which finding of fact or conclusion of law this argument relates to, so we must infer from the argument which findings and conclusions are actually challenged.

Finding of fact 10 states that "Graber was an absentee owner of his property located at 20020 SR [State Route] 530." Graber allege that he lived on another section of the ranch and therefore was not an absentee owner.[6] That allegation is not supported by the record. Gary Graber testified that he lived at his address in Marysville. Gary Graber also testified that he "sleeps" 45 minutes away from the site of the crash, although he asserted that his "principal time" is spent at the property. Graber's testimony constitutes substantial evidence to support the trial court's finding that Graber did not live on the property and could be characterized as an absentee owner.

Finding of fact 19 states, "The evidence shows that . . . Graber failed to take reasonable care to make sure that his cattle did not run off the property, onto the property of others or onto SR 530." In finding of fact 15 the trial court found that the method of securing the gates by using twine "was not reasonable or adequate, especially for an absentee owner." We infer that Graber challenges these findings by his arguments that he took reasonable care to prevent the escape of cows. Graber makes several arguments challenging these findings of fact. First, Graber argues that he had tenants living on different sections of the property to prevent vandalism. But, no tenant lived on the property at the time of the collision. Graber next argues that tying closed gates with bailing twine, rather than securing the gates with locks, was a reasonable

[6] Black's Law Dictionary does not define "absentee owner." But, it defines "absentee landlord" as "[a] landlord who does not live on the lease premises; [usually], one who lives far away." Black's Law Dictionary 957 (9th ed. 2009). From that definition we infer that the trial court merely found that Graber did not live at the property in question.

practice and no more likely to result in vandalism and escaped cows than if he had used locks. Graber's own witness, a neighbor John Hillis, Jr., admitted that a reasonable owner of property adjacent to a public highway should have put locks on his outside gates. Another neighbor testified that twine was insufficient. Also, evidence showed that Graber himself believed that strangers had opened his gates on several occasions, but he declined to add locks because, as he described to one witness, he was "kind of lazy" and it was too much trouble to lock and unlock gates or provide other additional protections. Graber argued that not even locks would have prevented escape of the cattle due to vandalism, but at least one neighbor testified that he was able to restrain his cattle from entering the highway.

Substantial evidence supported findings of fact 10, 15, and 19.

B. Conclusion of Law 3

Conclusion of law 3 states that "Graber failed to show that ordinary and reasonable care had been exercised, under the circumstances, to prevent his livestock from getting onto the highway adjacent to his property." The findings analyzed above that Graber did not take reasonable care to prevent the escape of cattle, supported by substantial evidence, supports the legal conclusion that Graber failed to show that ordinary and reasonable care had been exercised.

Additional evidence, that cows had previously escaped and that vandals had previously opened the gates, further supports the conclusion that Graber failed to take reasonable care to prevent the escape of cattle. Neighbors testified that before the collision they had repeatedly called Graber to notify him

that cattle had left the property. One neighbor testified that he called Graber dozens of times about his cattle on the highway. Several neighbors testified that the cattle were underfed in the late summer and that Graber could have prevented their escape by supplementing pasture feeding with hay, as other neighbors did.

Graber had experienced several acts of vandalism on the property. He reported several times to neighbors that vandals had opened his gates. He failed to take any action to prevent future vandalism. Graber's own witness testified that proper gates would have helped to prevent trespassers. His knowledge of the risk of vandalism demonstrated the need to take additional precautions to prevent the escape of cows through the gates even under his theory of the case, which the court rejected.

This evidence and the supporting findings of fact adequately support conclusion of law 3.

II. Contributory Negligence of Moe

The trial court found and concluded that Moe was 15 percent negligent. Graber alleges that the trial court should have allocated more than the 15 percent fault to Moe, because Moe had time to avoid the collision.

Moe testified that at the time of the crash he was not tired, not speeding, not listening to the radio, and not in a hurry. He testified that it was an extremely dark, overcast night. He testified that he was especially alert just before the collision after he noticed that a car driving 150 feet in front of him flashed brake lights. Even so, he saw the cow only immediately before impact, perhaps 20 feet

in front of him and could not possibly avoid the collision.

Graber asserts that Moe offered conflicting versions of the accident. But, the trial court found Moe's testimony credible. This court may not question the credibility determination of the trial court. Fisher Props., 115 Wn.2d at 369-70.

The responding officer testified that he believed Moe acted reasonably. Also, each party put forth expert testimony. The trial court stated in its oral ruling, "I did not find either expert to be totally convincing in their respective conclusions." Moe's expert, although not "totally convincing," also supported the reasonableness of Moe's actions. Conflicting testimony presented by Graber may not be used to disturb the trial court's finding of fact. Merriman, 168 Wn.2d at 631. Substantial evidence supported the trial court's finding that Moe was only 15 percent at fault. That finding in turn supports the court's conclusion of law on this issue.

Graber alleges that the trial court was not permitted to find that Moe was only 15 percent at fault: that the court was required to find either 50 percent fault or zero fault. No legal authority or analysis supports this position. The trial court found that Graber's negligence was the most significant proximate cause for the damages resulting from the collision. Graber fails to show how this was error.

We affirm the 15 percent allocation of fault to Moe.

III. Segregation of Damages or Allocation of Fault

Graber has asserted three theories which rely upon the existence of an unknown actor. First, he argued at trial that the actions of an unknown actor constituted a superseding cause of Moe's damages, cutting off his liability. The

trial court found only that "[a]ny unknown defendants were at most an intervening and not a superseding cause of Plaintiff's injuries." The trial court also found, "There is no evidence that . . . Graber was actually victimized on the day of the collision or on any other day prior to the collision." Graber abandoned the theory of a superseding cause on appeal.

Second, Graber argues the new theory on appeal[7] that the trial court was required to segregate damages between himself and the unknown actor as required by Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003), on the basis that the unknown person acted intentionally. Tegman held that, under RCW 4.22.070, the damages resulting from negligence must be segregated from those resulting from intentional acts, and the negligent defendants are jointly and severally liable only for the damages resulting from their negligence. 150 Wn.2d at 105; see also Rollins v. King County Metro Transit, 148 Wn. App. 370, 377, 199 P.3d 499, review denied, 166 Wn.2d 1025, 217 P.3d 336 (2009); Jane Doe v. Corp. of the President of the Church of Jesus Christ of the Latter-Day Saints, 141 Wn. App. 407, 438, 167 P.3d 1193 (2007). But, Graber failed to timely raise this argument. RAP 2.5 permits the appellate court to refuse to review any claim of error which was not raised in the trial court.

[7] Graber did not raise the issue of segregation or allocation of damages at trial. Graber's answer did not plead nonparty at fault as an affirmative defense in their answer as required by CR 8(c) and CR 12(i). At trial, Graber argued only that the actions of unknown third parties were the sole cause of Moe's injuries, constituting a superseding cause that cut off Graber's liability. Graber did not argue in his trial brief that damages should have been segregated under Tegman v. Accident & Medical Investigations, Inc., 150 Wn.2d 102, 75 P.3d 497 (2003), or apportioned under RCW 4.22.070.

RAP 2.5's prohibition is discretionary. Roberson v. Perez, 156 Wn.3d 33, 39, 123 P.3d 844 (2005). We decline to address this new argument for segregation of damages.

Third, Graber argues the new theory on appeal that the trial court was required to apportion damages between himself and the unknown actor on the basis that the unknown person acted negligently.[8] In actions claiming fault of two or more negligent entities, the trier of fact must determine the percentage of total fault attributable to each and every non-immune entity that caused plaintiff's damages. RCW 4.22.070(1). Where, as here, the plaintiff is also at fault, each party's fault is several. RCW 4.22.070(1). Graber also failed to raise apportionment at trial, and again we decline to address this new argument.

If we were to address these issues, we note that both segregation under Tegman and apportionment under RCW 4.22.070(1) require Graber to prove the existence of a third party to whom a portion of the damages may be attributed. Fault of a nonparty is an affirmative defense. CR 8(c). The defendant has the burden to prove an affirmative defense. Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000). As noted above, the trial court found only that there was no evidence that Graber was "actually victimized" by a third party. This finding encompasses the absence of either a negligent third party or third party intentional tortfeasor. To the extent Graber argues that the trial court did not

[8] Graber did not at trial, and does not here, clearly articulate on what legal basis the unknown "vandals" who opened the gates would have been liable in tort, either under a negligence theory or an intentional tort theory. At times Graber referred at trial to theft, malicious mischief, and vandalism.

make an explicit finding of fact regarding whether there was a third party who contributed to the damages,[9] the lack of an essential finding is presumed equivalent to a finding against the party with the burden of proof. In re Welfare of A.B., 168 Wn.2d 908, 927, 232 P.3d 1104 (2010).

Substantial evidence supports these findings. The testimony showed that performing a theft of Graber's cattle would have required a large vehicle and a large number of people. Testimony also showed that it would be difficult to perform such a feat on a dark night. No cows were missing from Graber's property. No person testified that they saw any other person or vehicle at the time of the collision. No one testified to seeing any evidence of vandalism or theft the evening of the collision. Additionally, no one testified that there had ever been such a theft of cattle at that property or any other property in the region. At least one neighbor testified that they had no knowledge of any "cattle rustling" in the area and likely would have heard about it had any such activities occurred at any other ranch. Neighbors testified that before the collision they had repeatedly seen cows outside Graber's fence, either on neighboring property or on the highway.

Graber offered no direct evidence to support third party intervention to let the cows out. Testimony by the responding officer that he found bailing twine by the open gates and that the cow hit by Moe returned to its pasture through those gates by itself does not establish the presence of a third party or establish that

[9] We note that the trial court stated in its oral ruling that "I think the odds are that the defendant himself did not open the gate."

the evidence is insufficient to support the trial court's findings of fact. While the officer testified to cow tracks going in and out of the gate, no witness testified to the presence of human footprints or tire tracks at the area.

Sufficient evidence supported the conclusion that no third party contributed to Moe's damages. Therefore, even if Graber's arguments relating to segregation and allocation of damages had been timely raised, they would not be entitled to such relief.

We affirm.

Appelwick, J.

WE CONCUR:

Schindler, J.

Grosse, J.