RENDERED: JULY 27, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000860-MR

DEWEY LOVELESS — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO.03-CI-00149

ROY RINGSTAFF; TONI BELL RINGSTAFF; SCOTT RINGSTAFF; MICHELLE RINGSTAFF — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Dewey Loveless appeals from an order of the Livingston Circuit Court granting summary judgment to the late Roy Ringstaff and

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

members of his family upon Loveless's claim that the Ringstaffs were negligent in connection with an incident in which he was injured while loading cattle. We affirm.

In 2002, Roy Ringstaff[2] and his son, Scott Ringstaff, were operating a cattle farm in Livingston County. They had operated the farm since sometime in the 1970s. Loveless also ran a small cattle operation with his brother, had bought and sold cattle for much of his life, and had considerable experience in cattle operations. Loveless had known the Ringstaffs for years, and they were friends.

On September 23, 2002, Loveless was helping the Ringstaffs load cattle at the Ringstaff cattle farm. Loveless had helped the Ringstaffs load cattle on several previous occasions. He did so without compensation. The breed of cattle being loaded was the Salers Breed, which is a larger than average breed.

The cattle were being loaded onto trailers for transportation to the stockyard. The trailers were provided by the stockyard company. Two trailers had been loaded, followed by a delay of nearly two hours to await the arrival of the third trailer. According to Loveless, it was an unusually hot day and the cattle had become restless.

As the third trailer was being loaded, one of the cows ran back down the loading shoot and trampled Loveless. According to Loveless, the cow "went crazy." As a result of the incident, Loveless suffered injuries to both of his legs.

On September 18, 2003, Loveless filed a civil complaint in the Livingston Circuit Court. Roy Ringstaff and his wife, Toni Bell Ringstaff, and Scott Ringstaff and his wife, Michelle Ringstaff, were named as defendants. The complaint alleged that the

[2] Ringstaff died after Loveless filed the notice of appeal in this case.

Ringstaffs were negligent in causing his September 23, 2002, injuries. Following the completion of discovery, the Ringstaffs filed a motion for summary judgment. On March 22, 2005, the circuit court entered an order granting summary judgment to the Ringstaffs. This appeal by Loveless followed.

Loveless contends that the circuit court erred by granting the Ringstaffs summary judgment. He alleges that there are issues of fact concerning whether the Ringstaffs provided sufficient protection to the individuals who assisted them in loading the cattle, whether the equipment used during the loading of the cattle was properly maintained, and whether cattle prods should have been used during the loading of the cattle.

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp*., 56 S.W.3d 432, 436 (Ky.App. 2001), citing *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480-82 (Ky. 1991).

"The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.'" *Lewis*, 56 S.W.3d at 436, citing *Steelvest*, 807 S.W.2d at 482. The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest*, 807 S.W.2d at 480. The Kentucky Supreme Court has held that the word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis*, 56 S.W.3d at 436. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo." *Scifres*, *supra*.

A negligence action requires proof of: (1) a duty on the part of the defendant; (2) a breach of that duty; (3) a consequent injury, which consists of actual injury or harm; and (4) legal causation linking the defendant's breach with the plaintiff's injury. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 88-89 (Ky. 2003).

"[A] premises owner has a duty to conduct his activities in such a way as not to expose others to what in the circumstances would be an unreasonable risk of harm." *Baker v. McIntosh,* 132 S.W.3d 230, 232 (Ky.App. 2004), citing *Perry v. Williamson*, 824 S.W.2d 869 (Ky. 1992). Further, "one who possesses or harbors a domestic animal that he does not know or have reason to know to be abnormally dangerous, is subject to liability for harm done by the animal if, but only if, (a) he

intentionally causes the animal to do the harm, or (b) he is negligent in failing to prevent the harm." *Id.*, quoting *Restatement of the Law (Second) Torts* § 518.

In addition, "a visitor to a work space, particularly a gratuitous visitor or licensee, 'is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted [enterprise].'" *Id., quoting Bonn v. Sears, Roebuck & Company*, 440 S.W.2d 526, 529 (Ky. 1969). And "reasonable care on the part of the possessor of . . . premises does not ordinarily require precaution or even warning against dangers that are known to the visitor or so obvious to him that he may be expected to discover them." *Id.*, *quoting Bonn* at 528. *See also Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc.*, 997 S.W.2d 490 (Ky.App. 1999), and *Scifres, supra*.

The recent *Baker* case is on point in all relevant respects and is controlling in this case. In *Baker*, the plaintiff, Baker, was an acquaintance of the defendant, McIntosh, who was a horse trader. As a friend of the family, Baker had visited McIntosh's farm on several occasions and had observed McIntosh's work. On an occasion when McIntosh was loading colts into a trailer, Baker arrived unannounced at McIntosh's barn. As was McIntosh's custom, he had backed the trailer into the barn's entrance and, to prevent the colts from escaping, had closed the barn's sliding door against one side of the trailer and had opened the trailer's swinging door against a wall inside the barn on the other side. McIntosh would then run a colt into the trailer, halter it, and tie it into place.

When Baker arrived, he helped McIntosh tie one of the colts in place in the trailer. Then, according to Baker, McIntosh asked him to hold the trailer door open while he ran the next colt aboard. Baker was standing behind the trailer door with his hand on the edge of the door between it and the barn wall. As McIntosh waved at the colts to shoo them into the trailer, one of the colts reared and fell back against the trailer door pinning and breaking Baker's wrist. Baker filed suit, but the circuit court granted summary judgment to McIntosh.

Citing the authorities we have set forth above, the *Baker* court affirmed the circuit court and stated:

> [w]e agree with the trial court that the record indicates no issue of material fact and that under the legal principles just stated McIntosh did not breach his duty of care toward Baker. McIntosh was entitled to conduct his business as he was accustomed. The risk that stock being loaded into a trailer will bump against adjacent doors, particularly colts well known to be rambunctious and skittish, was, or should have been, as apparent to Baker as to McIntosh. McIntosh thus had no duty either to prevent the colt from falling against the trailer door or to warn Baker that contact with the door was possible.

Id. at 232-233.

The rationale identified in *Baker* applies with equal force in the present case - arguably even more so because Loveless is an experienced cattleman whereas Baker was not an experienced horse handler. Loveless knew the risks associated with the loading of cattle. He knew that cattle left penned in the heat for an extended period could become restless and act unpredictably. He was aware of the consequences of using cattle

prods and the risks of loading with a shortage of hands (if there was a shortage). To the extent any of the fencing was bowed and presented additional dangers, such was an open and obvious condition. As such, under the authority of *Baker*, we are compelled to affirm the circuit court's award of summary judgment.

Our conclusion that summary judgment was proper is supported by Loveless's inability to identify any breach of duty by the Ringstaffs. When asked at his deposition to identify any negligent conduct by Roy Ringstaff or Scott Ringstaff, Loveless testified as follows:

> Q. What did Roy Ringstaff do wrong on that day?
>
> A. Didn't let Stanley go get the trailer, and the livestock company didn't send the trailers.
>
> Q. What did Scott do wrong?
>
> A. He should have stayed there. If Scott would have been there, he would not have let me get trampled. I might have got hit, but Scott would have got the cow off of me. I know him too well.

The failure identified in getting the trailer refers to the delay that resulted between the loading of the second and third trailers, which resulted in the cattle becoming more restless. However, Loveless's injury was not a foreseeable result of any delay in getting a trailer. To the extent that it was, as an experienced cattleman, the danger of the additional delay - increasing the restlessness of the cattle - was known to him.

The breach of duty attributed to Scott was his leaving the scene prior to the accident. The record discloses that Scott left the scene to go to work. However, as a

matter of law, this was not a breach of any duty owed to Loveless. To the extent this may have left the loaders shorthanded, any risks attributable to this were known to Loveless.

In short, under the facts viewed most favorably to Loveless and pursuant to the authority of *Baker*, the circuit court properly awarded summary judgment to the Ringstaffs.

The judgment of the Livingston Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Benjamin J. Lookofsky
Mayfield, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Mike Moore
Paducah, Kentucky