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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1989**

Shane Reasner,
Appellant,

vs.

Ross Goldsmith, et al.,
Respondents.

**Filed July 9, 2018
Reversed and remanded
Rodenberg, Judge**

Fillmore County District Court
File No. 23-CV-17-102

Jeremy L. Lampman, Patterson Dahlberg, Rochester, Minnesota (for appellant)

Scott V. Kelly, Joseph A. Gangi, Farrish Johnson Law Office, Mankato, Minnesota (for respondents)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Shane Reasner challenges the summary-judgment dismissal of his statutory and common-law negligence claims for personal injuries appellant claims to have sustained when his vehicle collided with respondents' cow on a public highway. Appellant

argues that genuine issues of material fact exist with respect to his claims. We agree. Therefore, we reverse and remand.

FACTS

Appellant was driving a car with one passenger on a country road at night, when he struck a black cow owned by respondent Goldsmith Brothers. Appellant claims to have sustained injuries. Respondent Ross Goldsmith (Goldsmith) owns a house and acreage near the road. Goldsmith and his brother own and operate Goldsmith Brothers, a farming operation, which owns farm property and cattle. Together, respondents own a tract of land that abuts the road on which appellant was driving when he struck respondents' cow. Respondents' land is divided into two areas. One area (tilled land) is fenced, tilled, and lies immediately adjacent to and north of the road. A second fenced area (pasture land) is a pasture and lies farther north and not adjacent to the road. There is a gate (pasture gate) between the tilled land and the pasture land. There is a second gate (road gate) that provides access to the road from the tilled land. It is undisputed that, on the night of the accident, a number of respondents' cattle exited respondents' property through the road gate and wandered onto the road, where appellant's car struck one of the animals.

Goldsmith stated in his deposition testimony that he inspects the fences weekly. He testified that the cattle had been held in the pasture land for seven to ten days before the night of this incident. Goldsmith testified that the cattle broke through the closed pasture gate that night, got into the tilled land, and then went through the road gate and onto the road. Goldsmith further testified that, on the day of the incident, he was on a tractor and

working the tilled land. He did not see the cattle in the tilled land. When he last saw the cattle, they were in the pasture.

Goldsmith further testified that, on the night of the accident, all of the 13 adult cattle and their 12 calves left the pasture. Only the cow hit by appellant's car was injured. He opined that the cattle must have been "spooked" that night, because they were upset when he found them after the accident. Goldsmith testified that he checked the pasture gate the day after the accident, and it had broken wires, which he repaired. Goldsmith did not take a picture of the broken pasture gate, but an insurance adjuster took a photo of the pasture gate after it had been repaired. Goldsmith recalled that the cattle had only broken out of the pasture fence once before, and had been held in that pasture "since probably 1958." At that time, the cattle escaped through the pasture fence and not through the pasture gate.

Appellant testified in his deposition that, while he was receiving emergency medical treatment after the accident, Goldsmith spoke with him and said, "I'm sorry I left the gate open. It's my fault." Appellant recalled that the cattle were generally located in a field near Goldsmith's barn that had wooden feed bunks, because "every time" he drove by the field, the cattle were there. Goldsmith's barn sits near the road gate at the southern edge of the tilled land. Appellant also testified that he had previously seen the cattle in an "upper rear pasture." He testified that he did not know where the cattle were during the time before the accident.

Travis Dickinson, who lives near the Goldsmith farm, was the passenger riding with appellant when the accident happened. He stated in his deposition that, on the morning before the accident, he drove by the Goldsmith farm and saw the cattle being fed by

Goldsmith in the tilled land “approximately 40 to 50 yards” from the road gate. Dickinson also stated that he was aware that the Goldsmith cattle had escaped three times during 2010 and 2011.

Appellant sued respondents, alleging that respondents were liable for permitting the animals to run at large under Minn. Stat. § 346.16 (2016). He also asserted a common-law negligence claim.

Respondents moved for summary judgment, arguing that the undisputed facts establish that they neither permitted nor knowingly permitted the cattle to run at large under Minn. Stat. § 346.16, and that they are entitled to summary judgment on appellant’s common-law negligence claim, because the undisputed facts showed that respondent did not violate the standard of care. Respondents further argued that it was unforeseeable that the cattle would escape.

The district court granted respondents’ motion for summary judgment. It found that, before the accident, the cattle were in the pasture land, as Goldsmith’s deposition testimony indicated. It concluded that, despite Dickinson’s claim to have seen the cattle in the tilled land in the morning, “he [did] not know where the cattle were located after that time.” The district court relied on Goldsmith’s deposition to conclude that the cattle had been confined to the pasture. The district court found that the cattle broke through the pasture gate to enter the tilled land, from which they were able to walk through the open road gate and onto the roadway.

In granting respondents’ motion for summary judgment, the district court concluded that respondents were not liable under Minn. Stat. § 346.16 because they neither permitted

nor knowingly permitted the cattle to run at large, because the cattle were enclosed in the pasture land on the night of the accident. It found “that the undisputed facts show that [respondents] did confine the cattle and the pasture was completely enclosed by an acceptable legal fence and gate.” It concluded that respondents’ having left the road gate open “does not create a genuine issue of material fact as to whether [respondents] permitted the cattle to run at large. . . . Although Mr. Dickinson claims to have seen the cattle in the [tilled] land in the early morning hours the same day, . . . it is undisputed that the cattle had broken through the pasture gate.” It further concluded that “[n]either Mr. Dickinson nor Mr. Reasner know where the cattle were prior to the incident or how they got out of their pasture.” It noted that appellant’s complaint stated that the cattle were being kept in a “fenced enclosure.” The district court also concluded that it was unforeseeable that the cattle would escape from the pasture because respondents made weekly inspections and had no reason to suspect that the cattle would escape. It therefore summarily dismissed appellant’s complaint.

This appeal followed.

D E C I S I O N

Appellant argues that the district court should not have granted respondents’ summary-judgment motion because there exist genuine issues of material fact concerning all of his claims, and that the district court reached the conclusion that there were no genuine issues of material fact by impermissibly weighing the credibility of conflicting deposition testimony.

On appeal from summary judgment, we review whether there are any genuine issues of material fact and whether the district court erred in its application of the law. We view the evidence in the light most favorable to the party against whom summary judgment was granted. We review de novo whether a genuine issue of material fact exists. We also review de novo whether the district court erred in its application of the law.

STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 76-77 (Minn. 2002) (citations omitted). “[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). “A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution.” *Zappa v. Fahey*, 245 N.W.2d 258, 259 (Minn. 1976). “The district court’s function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. . . . [T]he court must not weigh the evidence on a motion for summary judgment.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

Minn. Stat. § 346.16 prohibits livestock owners from permitting animals to run at large, and provides for treble damages if a person “knowingly permit[s]” an animal to run at large. The supreme court has interpreted “running at large” to mean “the permitting of any animal mentioned in the statute to stroll, wander, rove or ramble at will without restraint or confinement.” *Pigman v. Nott*, 305 Minn. 512, 513, 233 N.W.2d 287, 288 (Minn. 1975) (quotation omitted). The supreme court has interpreted “permit” in the context of the statute to mean “to give an opportunity” and “to make possible.” *Peterson v. Pawelk*, 263 N.W.2d 634, 637 (Minn. 1978). A violation of Minn. Stat. § 346.16 is

negligence per se, and violation of the statute constitutes conclusive evidence of negligence “unless the violation is excusable or justifiable under the circumstances of the case.” *Id.*

I. Genuine issues of fact exist concerning whether respondents’ cattle were permitted to run at large.

Appellant argues that the district court erred in summarily dismissing his claims because genuine issues of fact remain for trial. Respondents agree that they own and are responsible for controlling the cattle. The issue on appeal is whether there exists any genuine issue of material fact regarding whether respondents permitted or knowingly permitted the cattle to exit their property.

In concluding that the cattle were enclosed in the pasture land, the district court necessarily credited Goldsmith’s testimony concerning the location of the cattle before the accident. Goldsmith stated during his deposition that the cattle had been enclosed in the pasture land for days leading up to the accident, and that they had broken through the fence on the night of the accident to gain access to the road. But the record contains evidence to the contrary. Dickinson testified in his deposition that, on that the morning of the accident, he saw the cattle being fed by Goldsmith in the tilled land, near the road. He testified that Goldsmith feeds the cattle by dispensing feed on the ground “40 to 50 yards” inside of the road gate.¹ Appellant also testified that he frequently saw the cattle near feed bunks by the barn. The barn is located near the southern boundary of the tilled land. By all accounts, including Goldsmith’s testimony, the road gate was left open. Appellant stated in his

¹ Dickinson drew a diagram to illustrate this point. The only gate included in this diagram is the road gate. Dickinson testified that he saw the cattle being fed “just inside these gates” that morning.

deposition testimony that Goldsmith apologized to him, saying that it was his fault the cattle escaped because he had left the road gate open. Goldsmith also testified in his deposition that the cattle (other than the cow hit by appellant's vehicle), had no injuries despite breaking through the pasture gate.

In viewing the evidence in the light most favorable to the party against whom summary judgment is sought, a district court considering a summary-judgment motion must also make all reasonable inferences in favor of the non-moving party. *Buskey v. Am. Legion Post #270*, 910 N.W.2d 9, 19-20 (Minn. 2018). In deciding a summary-judgment motion, a district court must not weigh evidence; instead, it must decide whether genuine factual issues exist. *DLH, Inc*, 566 N.W.2d 60 at 70. In crediting Goldsmith's testimony to conclude that, in the time leading up to the accident, the cattle were enclosed in the pasture, and rejecting Dickinson's testimony as being not probative concerning where the cattle had been situated before the accident, the district court improperly weighed conflicting evidence regarding the location of the cattle.

Viewing the record evidence in the light most favorable to appellant, and making all reasonable inferences in the same light, the evidence here is sufficient to "permit reasonable persons to draw different conclusions" about where the cattle were located on the night of the accident and whether they were properly enclosed. *See Schroeder*, 708 N.W.2d at 507. A jury could accept as true Dickinson's testimony about the location of the cattle that morning, and could reject Goldsmith's claim that the cattle were located in the pasture land behind the closed pasture gate. And Goldsmith makes no claim that he moved the cattle from the tilled land into the more-northerly pasture land on the day

preceding the accident. A jury could reject Goldsmith's testimony that the cattle were spooked and broke through the pasture gate, and credit appellant's testimony that Goldsmith admitted to the cattle escaping because he left the "gate" open. One reasonable inference from the absence of injuries on the other cattle is that they did not break through any fence or gate. A jury could, on this record, find that Goldsmith knew the animals were in the tilled land with access to an open gate when they escaped by crediting Dickinson's testimony that the cattle were located in the tilled land, with access to the road gate that Goldsmith testified had been left open for days leading up to the accident. Whether a jury will make any or all of these findings is not the issue in this appeal; those questions of fact remain for resolution at trial.

There is a genuine issue of material fact for trial concerning the location of the cattle and whether they were enclosed in the pasture land or left in the tilled land with the road gate open. And, there is a genuine factual issue concerning whether, by leaving the road gate open, Goldsmith permitted or knowingly permitted the cattle to run at large under Minn. Stat. § 346.16. These genuine issues of material fact preclude summary judgment on appellant's statutory claim.

II. There is a genuine issue of fact concerning whether respondent was negligent in confining the cattle.

Appellant also argues that the district court erred in concluding that there is no genuine issue of material fact concerning his common-law negligence claim.

The district court concluded that the cattle must have broken out of the fenced pasture, an unforeseeable event, because Goldsmith conducted regular maintenance and

made weekly inspections of the fence. In so concluding, the district court again credited Goldsmith's deposition testimony that he regularly checked and maintained the fence, and that the cattle had only broken out of the pasture fence once over a period of many years. As discussed above, Goldsmith testified that the cattle were spooked and broke through the pasture gate.

There is contrary evidence in the record. Photographs of the pasture gate exist, but none confirm that the pasture gate was broken. Dickinson testified about earlier escapes by the cattle. Whether the pasture fence and gate were adequately maintained, and whether the cattle were enclosed in the pasture land or in the tilled land with an open gate, remain unresolved issues of fact.

Viewing evidence in the light most favorable to appellant, genuine issues of material fact exist concerning Goldsmith's claimed negligence. As discussed above, the evidence suffices to "permit reasonable persons to draw different conclusions" about where the cattle were located leading up to the accident, and whether they were properly enclosed or were negligently left in the tilled land with access to an open gate. *Schroeder*, 708 N.W.2d at 507. Further, the evidence suffices to permit reasonable persons to draw different conclusions concerning whether, if the cattle were located in the tilled land, it was foreseeable that they would leave the property through the open road gate, or even whether it was foreseeable that the cattle would break through the pasture gate, if the fact-finder chose to discredit Goldsmith's deposition testimony regarding the adequacy and maintenance of the pasture gate. These are questions to be resolved at trial.

There are genuine issues of material fact concerning appellant's statutory and common-law negligence claims. We therefore reverse the summary adjudication dismissing appellant's complaint, and remand for further proceedings.

Reversed and remanded.