

STATE OF MICHIGAN
COURT OF APPEALS

LARRY MCDOWELL, d/b/a ANTLER RANCH,

Plaintiff-Appellee,

v

KATHLEEN FITZCRANE,

Defendant-Appellant.

UNPUBLISHED

September 23, 2008

No. 278480

Lapeer Circuit Court

LC No. 05-035667-CZ

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a \$100,000 judgment entered against her and in favor of plaintiff pursuant to a jury verdict predicated on the alleged deaths of deer on plaintiff's property ("Antler Ranch") on which he operated a deer and elk farm. Plaintiff's theory of liability was that dogs owned by defendant invaded plaintiff's property disturbing and thereby causing the deaths of a large number of his deer by, for example, scaring them so that they fatally collided with fencing in deer pens. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. MOTION FOR DIRECTED VERDICT OR JNOV

Defendant first argues that the trial court erred in denying her motions for a directed verdict or judgment notwithstanding the verdict (JNOV) because there was insufficient evidence to create a prima facie case that her dogs coming onto plaintiff's property and scaring his deer was a proximate cause of the death of 60 deer. Specifically, defendant contends that there was no more than speculation or conjecture in support of plaintiff's claim.

A. Standard of Review

We review a trial court's decision on a motion for a directed verdict de novo with the evidence considered in the light most favorable to the nonmoving party. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). Likewise, we review a trial court's denial of a motion for JNOV de novo, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004).

B. Analysis

Initially, and contrary to defendant's assertion, the evidence presented at trial did not need to support a conclusion that defendant's dogs caused the death of all 60 of plaintiff's deer that apparently died in the relevant time period. The jury did not determine in its verdict a specific number of deer that died as a result of defendant's negligence, but rather merely determined that defendant was negligent and that her negligence proximately caused plaintiff \$100,000 in damages. Plaintiff's theory of liability and damages was primarily based on defendant's dogs causing the death of deer owned by plaintiff. Accordingly, the jury's verdict must reasonably be considered to be based on a determination that defendant's dogs caused the death of a number of plaintiff's deer. However, rather than it being apparent that the jury determined that defendant's dogs were responsible for the death of 60 deer, its verdict may reasonably be considered to reflect that it found the dogs responsible for a lesser number of deer deaths. Plaintiff's accountant witness estimated the replacement cost of the dead deer to be \$127,655. The jury's award of only \$100,000 may thus be reasonably understood as holding defendant responsible for most—but not all—of the 60 deer deaths claimed by plaintiff. This would seem consistent with plaintiff's testimony acknowledging that there was a deer death rate of about two to three percent before the time period in which he alleged defendant's dogs were causing the death of his deer. Indeed, given that the jury's award of \$100,000 in damages was only slightly more than 78 percent of the estimated replacement cost of the dead deer of \$127,655, it is apparent that the evidence could have supported a larger verdict even without the jury finding defendant responsible for all 60 deer deaths.

There was sufficient evidence to reasonably support the jury's conclusion that by a preponderance of the evidence defendant's dogs were responsible for most of the deer deaths on plaintiff's property during the relevant time period, i.e., approximately August 2004 to February 2006. A plaintiff may show causation with circumstantial evidence. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). However, adequate circumstantial evidence of causation "must facilitate reasonable inferences of causation, not mere speculation." *Id.* at 164. Particularly, "the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id.* at 164-165. There was no direct evidence of causation in the sense of witnesses having directly seen defendant's dogs in the vicinity of plaintiff's deer pens and scaring the deer so that they fatally collided with fencing or otherwise died. However, multiple witnesses testified to seeing defendant's dogs on plaintiff's property, while other testimony described the existence of a visible dog path between defendant's property and plaintiff's property and indicated that defendant's dogs were observed roaming unrestrained in other locations. Additionally, Mark McDowell described an incident in which he heard deer hitting a fence and then found dog tracks behind the deer pens that led to defendant's property. Brandon McDowell similarly testified to an incident in which he heard a "loud bang," saw deer hit a fence, found a dead deer caught in a fence, and found dog tracks around the deer pens. Critically, plaintiff indicated that the percentage of deer deaths in the relevant time period from August 2004 to February 2006 was about 40 or 50 percent compared to a typical rate of about two or three percent. Strikingly, plaintiff and Mark McDowell indicated in their testimony that the large number of deer deaths stopped in February or March 2006, while defendant testified to 13 dogs leaving her property around February 2006 (apparently all the dogs she had since she estimated the highest number of dogs she ever had at her property as "[m]aybe maximum 13.") In addition, two expert witnesses indicated that deer could be scared by dogs, while Lee Ottie Thayer testified to having actually seen some of defendant's dogs chasing deer. Considered

together, the evidence of defendant's dogs being on defendant's property, the tendency of dogs to chase and scare deer, and the unusual number of deer deaths in the relevant time period presented powerful circumstantial evidence that defendant's dogs were responsible for the bulk of the deaths of plaintiff's deer during the relevant time period.

As to excluding other possible causes of the deaths of the deer, Brandon McDowell testified that Antler Ranch had not sustained "these types of losses of deer" from 1995 to August 2004, and that he had not seen any other animals that could have scared the deer besides defendant's dogs. Plaintiff testified that no animals besides defendant's dogs could have been scaring the deer. Defendant offers as other possible explanations for the deer deaths the sound of firearms used by hunters (presumably referring to hunting on nearby property), the sounds of snowmobiles and motor vehicles driving on the road on which plaintiff's property was located, harassment by foxes and coyotes, and the stress of confinement. However, it is readily apparent that to whatever extent these factors were present it could reasonably be concluded that there was no basis to conclude that they were present at a greater level during the time of the large number of deer deaths from approximately August 2004 to February 2006. Thus, the jury could reasonably have determined that the great bulk of the deer deaths at issue could not be attributed to such recurring factors but rather were more likely than not caused by defendant's dogs invading plaintiff's property. In this regard, rather than being mere conjecture, there was evidence allowing a reasonable deduction that defendant's dogs were the most likely cause of the deer deaths. See *Skinner, supra* at 164, quoting *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956) ("As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.").

Defendant emphasizes language in *Skinner, supra* at 163, that, "the mere happening of an unwitnessed mishap neither eliminates nor reduces a plaintiff's duty to effectively demonstrate causation." But this case does not involve a single isolated mishap. Instead, it involves evidence of a greatly increased number of deer deaths during a period in which defendant failed to properly restrain her dogs but rather allowed them to freely roam, including specific evidence of dog tracks indicating that the dogs invaded plaintiff's property. Plaintiff effectively presented circumstantial evidence that the large increase in deer deaths was attributable to deaths caused by defendant's dogs. In this regard, we cannot conceive any sound reason why plaintiff should be required to specifically prove the particular circumstances of the death of any individual deer when the circumstantial evidence strongly supports a conclusion that more likely than not defendant's dogs were responsible for the great bulk of the otherwise inexplicably large number of deer deaths in the relevant period.

II. REMITTITUR OR NEW TRIAL

Defendant alternatively argues that the trial court improperly denied her motion for a new trial or remittitur because plaintiff did not present a prima facie case that she was responsible for the death of 60 deer.

A. Standard of Review

A trial court's decision whether to grant a new trial or whether to grant remittitur are each reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007) (new trial); *Coble v Green*, 271 Mich App 382, 392; 722 NW2d 898 (2006) (remittitur).

B. Analysis

The jury's verdict does not reflect that it found defendant responsible for the death of all 60 deer for which plaintiff sought compensation. Thus, defendant has not established that the trial court abused its discretion in denying her motion for a new trial or remittitur because there is no basis for concluding that the verdict was premised on a finding that she was responsible for the death of 60 deer.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens