THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No.: 2019-001879

Minnie Davis-Leaf, ...Appellant,

v.

Wanda Davis, ...Respondent,

AND

Elvis Nelson, ...Appellant,

v.

Kelsey Jones, Carroll Jones, and Wanda Davis, Defendants,
Of Whom Wanda Davis is the .....Respondent.

AND

Samuel Hayward, ...Appellant,

v.

Wanda Davis, ...Respondent.

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SC Court of Appeals

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

I. THE TRIAL COURT CORRECTLY CONCLUDED THERE WAS NO EVIDENCE UPON WHICH A JURY COULD FIND RESPONDENT NEGLIGENT IN PERMITTING HER HORSE TO LEAVE ITS PASTURE.

STATEMENT OF THE CASE

On June 19, 2017, Appellant Minnie Davis-Leaf filed a Summons and Complaint against former defendants Kelsey Jones, Carroll Jones, and Wanda Davis in the Court of Common Pleas for Sumter County. The Complaint sought to recover money damages against the defendants as a result of an accident that occurred on October 24, 2014, when Appellant Davis-Leaf's car struck a horse owned by Respondent Wanda Davis (hereinafter "Owner"), which was pastured on property (hereinafter "Property") owned by the Jones. An Answer denying liability and asserting affirmative defenses was filed and timely served.

On October 9, 2017, Appellants Samuel Hayward and Elvis Nelson each filed a Summons and Complaint against former defendants Kelsey Jones, Carroll Jones, and Owner in the Court of Common Pleas for Sumter County. The Complaints sought to recover money damages against the defendants as a result of an accident that occurred on October 24, 2014, when a van operated by Hayward in which Nelson was a passenger struck Owner's horse, which was pastured on the Property. Answers denying liability and asserting affirmative defenses were filed and timely served.

On January 24, 2019, Owner filed three Motions for Summary Judgment. On February 19, 2019, Owner filed a Memorandum in Support of each motion.

On April 2, 2019, mandatory mediation was conducted, and the cases were partially settled as to former defendants Jones, who were dismissed by stipulation on or about August 9, 2019.

On September 6, 2019, Appellants filed a Memorandum in Opposition to the motions.

A hearing on Owner's motions took place before the Honorable Kristi F. Curtis on September 9, 2019. After oral arguments, Owner requested and received permission to file a Reply addressing limited issues, which was filed on September 13, 2019.

The trial court granted Owner summary judgment by Orders filed October 21, 2019. Appellants each timely filed and served their Notice of Appeal. The three appeals have been consolidated by the court.

STANDARD OF REVIEW

Owner is satisfied that the proper standard of review has been set forth by Appellants.

STATEMENT OF FACTS

This case arises out of auto accidents that occurred on October 24, 2014, on Highway 378 in Sumter County when a van being driven by Appellant Samuel Heyward struck Owner's horse (hereinafter "Swinger"). Appellant Elvis Nelson was a passenger in the van. The impact killed Swinger, whose body was lying on the highway. Sometime after the initial impact, a car being driven by Appellant Minnie Davis-Leaf struck Swinger's body. [SJ Memo, Exhibit 1 – Accident Report]. The Appellants alleged injuries as a result of the accidents.

Swinger was pastured at the Property, which abuts Highway 378 close to the accident site. Swinger and another horse (hereinafter "Maximus"), which was owned by the Jones, were kept in a fenced pasture. The pasture contained a large barn and a lean-to. The pasture had an eight-foot gate and a four-foot gate. The four-foot gate was secured by a swing chain that wrapped around the fence post and gate post, which was then placed through a j-hook to lock the chain in place. The four-foot gate also had a rope on top of the gate that looped over the gate and fence post. [SJ Reply, Exhibit 1 –

C. Jones Depo, p. 16, line 2-p. 17, line 5; Exhibit 3 – Small Gate Photo]. The eight-foot gate was secured with a swing chain as described above, but the gate did not have an additional rope. [SJ Reply, Exhibit 1, p. 17, lines 6-12; Exhibit 4 – Large Gate Photo]. Both gates opened by swinging inward towards the pasture, as the fenceposts prevented them from being pushed outward. [SJ Reply, Exhibit 1, p. 21, line 20-p. 22, line 13; Exhibits 3 & 4]

There was never an occurrence where a horse pushed open the gate when secured. Additionally, if the rope and chain were used on the small gate, the gate would remain secure and the only way to unsecure the gate would be to unloop the rope and undo the chain. [SJ Reply, Exhibit 1, p. 21, lines 8-16].

During the daytime on October 24, 2014, Owner's daughter, Madelyn Davis (hereinafter "Daughter"), drove to the Property along with a friend to feed Swinger and Maximus. The Jones were out-of-town at the time.[1] [SJ Memo, Exhibit 3 – Daughter depo p, 27, lines 5-25].

Daughter obtained the food from an area adjacent to the horse stalls, poured the food over the rails, and left. Daughter spent approximately ten minutes at the Property. [SJ Memo, Exhibit 2, p. 28, lines 2-6; p. 29, lines 16-20]. Daughter did not open either gate on the date of loss, nor did she enter the pasture by climbing over the rail. [SJ Memo, Exhibit 2, p. 35, lines 9-12; p. 52, lines 7-25]. Daughter stated with certainty that both gates were closed and secured when she left the Property on the afternoon of the incident. [SJ Reply, Exhibit 2, p. 29, line 21-p. 30, line 10; p. 51, line 1-p. 52, line 25; p. 55, lines 7-14; p. 68, lines 7-12; p. 86, lines 15-21].

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[1] It is undisputed that Owner did not go to the Property on the date of the incident. [SJ Memo, Exhibit 2 – Owner Depo, p. 27, lines 23-25].

The accident occurred at approximately 9:00 p.m. on October 24, 2014, several hours after Daughter left the property. [SJ Memo, Exhibit 1]. Former defendant Kelsey Jones testified that her niece arrived at the scene of the accident and checked on the Property at which time she found Maximus "upset prancing" and the "gate opened," which she closed "to keep Maximus inside." [App. SJ Opp. Memo, Exhibit 3 – K. Jones Depo, p. 14, lines 11-13; SJ Memo, Exhibit 2, p. 27, lines 20-22]. There is no information as to how the small gate became unsecured to allow Swinger to get out of the pasture and onto Highway 378. A post-accident inspection of the gates and fence revealed no problems. [SJ Memo, Exhibit 2, p. 27, lines 20-22; SJ Reply, Exhibit 1, p. 29, line 24-p. 30, line 10; p. 30, line 23-p. 31, line 17].

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED OWNER'S MOTIONS FOR SUMMARY JUDGMENT.

S.C. Code § 47-7-110 provides in part, "[i]t shall be unlawful for the owner or manager of any domestic animal of any description wilfully or negligently to permit any such animal to run at large beyond the limits of his own land or the lands leased, occupied or controlled by him." However, § 47-7-110 has not been interpreted to impose an absolute duty on an owner to prevent escape of livestock; "rather, evidence of negligence in permitting animals to stray must be presented." *Oconee Roller Mills, Inc. v. Spitzer*, 300 S.C. 358, 361, 387 S.E.2d 718, 720 (Ct. App. 1990)

To be liable under S.C. Code § 47-7-110, the Plaintiff must present evidence of negligence to overcome summary judgment. *Williams v. Smalls*, 390 S.C. 375, 381, 701 S.E.2d 772, 775 (Ct. App. 2010) (stating "[o]ur supreme court has held the duty imposed by section 47-7-110 to not willfully or negligently allow stock to run at large will not

support negligence per se, a plaintiff must provide evidence of negligence in order to overcome summary judgment.").

It is well established that South Carolina does not recognize the rule of *res ipsa loquitur*. *Snow v. City of Columbia*, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991). "In an action for negligence, the plaintiff must prove by direct or circumstantial evidence that the defendant did not exercise reasonable care." *Id.* The burden of proving each element of negligence, including the defendant's lack of due care, lies with the plaintiff. *Id. citing South Carolina State Ports Authority v. Booz–Allen & Hamilton,* 289 S.C. 373, 346 S.E.2d 324 (1986); *Carter v. Columbia Gas & Railway Co.,* 19 S.C. 20 (1883). The plaintiff's burden of proof cannot be met by relying on the theory that "the very fact of injury indicates a failure to exercise reasonable care." *Id. citing King v. J.C. Penney Co.,* 238 S.C. 336, 120 S.E.2d 229 (1961); *Gilland v. Peter's Dry Cleaning Co.,* 195 S.C. 417, 11 S.E.2d 857 (1940). "No inference of negligence arises from the mere fact of injury." *Id.* "For circumstantial evidence to be sufficient to warrant the finding of a fact, the circumstances must lead to the conclusion with reasonable certainty, and must have sufficient probative value to constitute the basis for a legal inference, and not for mere speculation." *Holland v. Georgia Hardwood Lumber Co.*, 214 S.C. 195, 204–05, 51 S.E.2d 744, 749 (1949). "The existence of a fact or facts cannot rest in speculation, surmise or conjecture." *Id.*

A. There was no direct or circumstantial evidence of Owner's negligence.

It is undisputed that there is no direct evidence showing a negligent act or omission by Owner that allowed Swinger to leave the pasture and enter the road. It is also undisputed that Owner did not go to the pasture on the date of the incident. [SJ Memo, Exhibit 2, p 27].

Appellants contend there is at least a scintilla of evidence to submit the issue of Owner's negligence to a jury based on the following deposition testimony:

- Owner testified that when the went to the Property on a prior occasion, she found Maximus was outside of the pasture;
- Owner testified she had previously found the four-foot gate open, so she secured the gate with a lead (rope);
- Owner did not tell the Jones' that Maximus was outside of the pasture or about the small gate being open.

[App. Br. p. 5]. Appellants argue the above "supports an inference of negligence on the part of [Owner] in not properly securing the pasture containing her horse on the night of October 24, 2014." [App. Br. p. 7].

First, the Jones were aware that Maximus had gotten out of the pasture on one occasion when he was a small colt and able to get through the electrified wire fence. [SJ Reply, Exhibit 1, p. 18, line 7-p. 20, line 4]. Moreover, there is no evidence that Swinger ever escaped from the pasture prior to the incident. [SJ Memo, Exhibit 2, p. 27, lines 17-19; Exhibit 3, p. 55, lines 13-14]. The Jones were also aware that if the gate was left open, their horses could get out of the pasture. [SJ Reply, Exhibit 1, p. 18, line 7-p. 20, line 4].

If Owner reported the above issues, it would only provide the Jones with information already in their possession. Moreover, there is no evidence that if Owner reported the issues above, that it would have led to any change in how the gates were secured. Mr. Jones testified there was never an occurrence where a horse pushed upon the gate when secured. Mr. Jones testified that if the rope and chain were used on the small gate, the gate would remain secure and the only way to unsecure the gate would be

to unloop the rope and undo the chain. [*Id.*, Exhibit 1, p. 21, lines 8-16]. Also, there is no evidence the small gate would open on its own *if* unsecured.[2]

There is not a scintilla of evidence that Owner not reporting the information above resulted in the small gate being opened on October 24, 2014. Accordingly, the trial court correctly granted summary judgment in Owner's favor and the Order should be affirmed.

B. There was no direct or circumstantial evidence of Daughter's negligence that could be imputed to Owner.

a. Daughter's actions or inactions cannot be imputed to Owner

The trial court ruled in part as follows:

> A parent is not liable for the negligence of her child by reason of the relation of parent and child and absent a showing the child is the agent of the parent. If the child is the agent of the parent, then the existence of the parent-child relationship does not destroy the liability of the principal (parent) for the acts of the agent (child) so long acts of the agent (child) are done in the course of his employment with the principal (parent). *Norwood v. Coley*, 235 S.C. 314, 317–18, 111 S.E.2d 550, 551 (1959) (internal citations omitted).
>
> There is no evidence Defendant's daughter was instructed by the Defendant to do anything other than feed the horses on the day of the accident. Accordingly, to the extent a principal-agent relationship could be construed, it would be limited in scope to feeding the horses. As such, any argument that the Defendant could be found negligent by a jury because her daughter did not physically inspect the gates on the day of the accident is without merit.

[SJ Order, p. 8].

The trial court's determination limiting the scope of the principal-agent relationship between Owner and Daughter, if any, to feeding, and its holding that Owner could not be found negligent if Daughter did not physically inspect the gates has not been

[2] The gates swing/open into the pasture and are prevented from being pushed open by the fence posts as previously discussed. [SJ Reply, Exhibits 3 & 4].

briefed by Appellants and, therefore, is the law of the case. *State v. Lindsey*, 394 S.C. 354, 364, 714 S.E.2d 554, 559 (Ct. App. 2011) (stating failure to address issue in the brief, precludes consideration on appeal) *citing Wright v. Craft,* 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (holding an issue listed in statement of issues on appeal but not addressed in brief is abandoned)

As the trial court's ruling that Owner could not be found negligent under a principal-agent theory has been abandoned on appeal, the trial court's Order granting summary judgment should be affirmed.

b. Daughter's actions or inactions were not negligent

Appellants contend there is a scintilla of evidence to submit the issue of Owner's negligence to a jury due to Daughter's actions or inactions based on the following deposition testimony:

- Daughter went to the pasture sometime after school on the date of the accident to feed the horses;
- Daughter spent ten (10) minutes at the property and parked 100 feet from the pasture;
- Daughter could not see if the chains on the gate were on the latch and there was no lock on the gate, and that putting a lock on the gate would provide more security to prevent a horse from getting out;
- Daughter did not physically check the security of the gates on the date of the accident.

[App. Br. p. 6]. Appellants also contend representations made to the trial court that Daughter testified unequivocally the gates to the pastures were secure was not the case because Daughter did not physically inspect the gates. [App. Br. p. 5].

Daughter testified with certainty that when she left the Property on October 24, 2014, the gates were closed and secure:

Q. And what did you observe with regards to the gate when you were there?

A. They were closed.

. . .

Q. Sure. And I guess I'm just asking you, can you say with certainty, when you were there on October 24 of 2014, that the gates were closed?

A. Yes.

Q. And that's because you observed them closed, correct?

A. Yes. I mean, I always look. I glance over there.

Q. And were they latched closed?

A. You could see that the chains were around them, but that's it.

Q. So on October 24 of 2014, when you were there, the gates were latched around the gate and the gates were closed, correct?

A. Yes.

. . .

Q. When you were there on October 24, 2014, the day that you went to feed her before this incident occurred, did you check to see if the gates were latched?

A. No. Because you could see them, like you would see if the chain wasn't around it, or you would see if it was open.

. . .

Q. So is that something that you would -- you would observe when you would go to the property to see that the gates were latched?

A. I would have noticed, yes.

Q. You would have noticed if they were unlatched?

A. Yes. I'm pretty observant, so I would have noticed.

Q. So you feel like you observed that the gates were latched when you were there?

A. The chains were around them. And that was the only thing that was around them.

...

Q. Did you feel like it was secure?

A. Yes.

...

Q. When you were there on October 24 of 2014, did you go in and out of any of these gates, the little gate or the big gate?

A. No.

Q. Did you leave the little gate or the big gate unlatched?

A. No. I hadn't been in them for months.

Q. If after the incident occurred, a gate was discovered unlatched, would that surprise you?

A. Yes.

Q. And why would it surprise you?

A. Because they weren't unlatched whenever I left.

...

Q. Do you dispute leaving the gate unlatched?

A. I didn't open the gate. And it wasn't open.

Q. So you didn't -- it was latched when you left?

A. Yes.

. . .

Q. I guess what I'm asking -- the gate was latched when you were there, correct?

A. That day, yes.

. . .

Q. So you were able to see all the way from the inside of the gate, that it was through the latch?

A. You could see the gate was closed, and that there was chains multiple times around it.

Q. Do you know if it was through the latch or not?

A. No.

. . .

Q. And in response to Attorney Moorman's questions, you said the chain went all the way around you observed the chain went all the way around the gate.

A. Yes.

Q. -- and the fence post, correct?

A. Yes.

. . .

Q. And you were comfortable when you left that day, that your horse was safe and secure inside that pasture; is that correct?

A. Yes.

[SJ Reply, Exhibit 2, p. 29, lines 2-3; p. 29, line 21-p. 30, line 10; p. 51, lines 1-6; p. 51, lines 9-19; p. 52, lines 2-3; p. 52, lines 7-18; p. 52, lines 22-25; p. 55, lines 7-9; p. 68, lines 7-12; p. 86, lines 1-6; p. 86, lines 18-21].

There is no evidence that Daughter opened either gate, failed to secure either gate, failed to notice either gate being opened or unsecured, or that she failed to take any reasonable action on the date of the incident which would have allowed Swinger to get out of the secured pasture several hours before the accident.

As there is no evidence that Daughter was negligent in allowing Swinger to leave the secured pasture, the trial court's Order granting summary judgment should be affirmed.

c. *Reed v. Clark* is distinguishable from the facts in this case and, therefore, not controlling

Appellants argue the decision in *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982) supports the proposition that, in this case, there was at least a scintilla of evidence from which a jury could infer negligence on the part of Owner for failing to keep Swinger in the secured pasture. [App. Br. pp. 7-8].

In *Reed*, the driver and passenger of a vehicle brought a negligence action against a horse owner when their vehicle struck the horse on a highway. Horse owner appealed the denial of his motions for directed verdict and judgment not withstanding the verdict. In affirming the denial of the motions, the court opined as follows:

> There is testimony that the fence at the place where the horse(s) apparently escaped was not strong enough under the attending circumstances: this portion of fence was next to a stall where horses congregate, the pasture was adjacent to a four-lane highway, and the risk to motorists, if horses escaped, was a potentially dangerous one. Further, there is evidence of prior escapes by horses on at least five occasions, admittedly known by the plantation employee who

> maintained the fences. The record shows additionally that the horses had been allowed to graze unrestrained outside the fenced pasture on prior occasions, thereby tending to induce a horse to seek greener pastures.

Reed, 277 S.C. at 314, 286 S.E.2d at 387.

The Court also stated, "[t]he fact that the same horse had escaped numerous times, even though from a different pasture with a different fence, is at least some competent evidence showing the propensity of this particular animal to seek freedom outside a fenced area." *Id.*

In the present case as discussed thoroughly above, there had been only one occasion when a horse was able to escape from the pasture. The horse was Maximus and it occurred when he was a small colt and was able to go under the electrified fence. There was no evidence Swinger ever escaped or even left the pasture without a handler. There was no evidence Swinger was allowed to graze outside the pasture. There was no evidence the fence was not secure. There was no evidence the gates would open without someone opening them or that the method of securing the gates was unreliable or subject to failure.

The uncontested evidence in this case is that on the afternoon of the day of the accident, the gate at issue was closed and secured with the chain. Accordingly, to find negligence, a jury would have to disregard the testimony of Daughter that the gates were closed and secured. The jury would then have to speculate that horse(s) either pushed open the gate, which only opened into the pasture, or pulled open the gate, after which only Swinger, with no prior history of leaving the pasture, left the property and ended up on the highway. The jury could also speculate that someone came onto the property and unsecured the gate after Daughter left the property but before the accident occurred. This

type of speculation and conjecture is specifically prohibited. *Holland*, 214 S.C. at 204–05, 51 S.E.2d at 749 (stating "[t]he existence of a fact or facts cannot rest in speculation, surmise or conjecture").

Based upon the absence of evidence of negligence, the trial court's Order granting summary judgment should be affirmed.

CONCLUSION

For the reasons set forth, Respondent respectfully requests the trial court's Orders granting her summary judgment be affirmed.

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April 15, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No.: 2019-001879

Minnie Davis-Leaf, ...Appellant,

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Kelsey Jones, Carroll Jones, and Wanda Davis, Defendants,
Of Whom Wanda Davis is the .....Respondent.

AND

Samuel Hayward, ...Appellant,

v.

Wanda Davis, ...Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served upon the person named below the attached **Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter via United States mail, first-class postage prepaid, to the following:

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April 15, 2020

The Honorable Jenny Abbott Kitchings
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Re: Minnie Davis-Leaf/Elvis Nelson/Samuel Hayward, Appellants v. Wanda Davis, Respondent
Appeal No.: 2019-001879
File No.: 5167.01118

Dear Ms. Kitchings:

Please find enclosed for filing one (1) unbound and one (1) bound copy of each of the following:

- Respondent's Initial Brief;
- Respondent's Designation of Matter to be Included in the Record on Appeal;
- Certificate of Service.

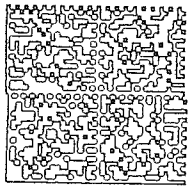
Please return a filed copy to me in the self-addressed postage paid envelope provided. Please do not hesitate to contact me with questions.

Sincerely,

Damon C. Wlodarczyk

DCW/mwt

Enclosures
cc: Counsel of Record



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