

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD D. MIZER	:	JUDGES:
	:	W. Scott Gwin, P.J.
Plaintiff-Appellant	:	William B. Hoffman, J.
	:	Julie A. Edwards, J.
-vs-	:	Case No. 09-CA-00026
	:	
AARON LEE SMITH, SR.	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Licking County Municipal Court Case No. 07-CVF-01009
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	December 21, 2009
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APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Edwards, J.

{¶1} Appellant, Richard D. Mizer, appeals a judgment of the Licking County Municipal Court granting judgment against appellant on his negligence claim against appellee Aaron Lee Smith, Sr., and awarding appellee damages of \$1,545.00 on his claim for trespass against appellant.

STATEMENT OF FACTS AND CASE

{¶2} Appellee owns a family farm in Licking County known as A&B Ranch. The farm consists of 180 acres. Most of the property is pasture on which appellee's livestock, including approximately 300 sheep, are permitted to graze.

{¶3} Appellant raises and trains Running Walker Hounds to hunt coyote. Appellant participates in coyote hunts with his dogs. In March of 2006, Terry Pettit contacted appellant to organize a coyote hunt on his property. Appellant agreed to conduct the hunt but required Pettit to contact neighboring landowners to get permission to hunt on their land. Appellant typically insisted on this precaution based on the unpredictability of where the coyote would run. Once on scent of a coyote, the dogs are very difficult to call off and will pursue the coyote as it runs in a large circle of around a 1.5 mile radius.

{¶4} Early in the morning hours of March 26, 2006, the scheduled coyote hunt began on Pettit's property. One of the participants in the hunt was Rex Redman. As of late morning, appellant's dogs had failed to pick up the scent of a coyote and the hunt at Pettit's property was terminated. Redman then suggested to appellant that they go hunt on his farm, which was about 12 miles away. While appellant normally would not conduct a hunt when he had not been assured that all of the surrounding landowners

have been notified and consented to the hunt, he agreed to hunt on Redman's property on Redman's verbal assurance that there would not be a problem with Redman's neighbors. However, none of Redman's neighbors were notified prior to the start of the hunt, and therefore the hunting party did not have permission from any of the surrounding landowners to hunt on their property.

{¶5} Appellee's farm is located near the Redman farm. On the day of the hunt, appellee and his children were repairing a fence in a pasture on the south end of their farm.

{¶6} Appellant released Punch and Spot, two of his Running Walker Hounds, on the Redman property. The dogs quickly picked up the scent of a coyote and left the Redman property in pursuit of the coyote. Each dog was wearing a collar which transmitted a radio signal, allowing appellant to track the dogs. When it became apparent that the dogs were on someone else's property running a coyote, appellant and the hunting party got into their vehicles to try to find the dogs, and to find out who owned the property so they could enter the property to kill the coyote they believed the dogs had cornered.

{¶7} Meanwhile, one of appellee's sons had returned to the house from the pasture where they were working. The son returned to the pasture on an ATV, yelling to appellee that he saw two dogs running through their sheep. Appellee jumped on the ATV and headed toward the sheep which were pastured near the house. As he drove over a hill, he saw two dogs running through the pasture. The dogs fled the area, but caused several of the sheep to run into a fence. Assuming the dogs would return,

appellee retrieved a rifle from the house and went back to repairing fence with his children.

{¶8} About an hour later, appellee saw the dogs enter his property again, crossing the fence about 100 yards from where appellee was working. The dogs were headed toward the field where his sheep were pastured. Appellee got on the ATV and chased the dogs away from the direction of the sheep and into the woods. Appellee shot both dogs, killing one immediately and fatally wounding the other. Appellee conceded that at the time he shot the dogs, they were not near the sheep.

{¶9} After hearing the shots, appellant and his companions traveled in the direction of appellee's farm. They discovered that one of the dogs was dead, and the other died soon thereafter. Appellant called the Licking County Sheriff's Office. Deputy Ed Razler arrived in response to the call. He was escorted to the place where the dogs had been shot, noting that the dogs were on appellee's side of the fence. He observed livestock in several pastures, but couldn't remember "if they were goats or sheep. Some sort of non-cow." Tr. 40.

{¶10} Appellee later discovered that a number of his sheep exhibited physical injuries from trying to elude the dogs and others later exhibited erratic behavioral problems consistent with sheep who have been "worried" or frightened by a threat. Some sheep had to be sold at reduced prices or slaughtered, and several aborted pregnancies.

{¶11} Appellant filed the instant action in the Licking County Municipal Court on April 12, 2007, seeking judgment in the amount of \$10,000 for damages caused by the

killing of the dogs. Appellant alleged that appellee was negligent per se under R.C. 959.02. On May 25, 2007, default judgment was entered in favor of appellant.

{¶12} On June 16, 2007, appellee moved for relief from the default judgment under Civ. R. 60(B). The court granted the motion on August 30, 2007. Appellee filed an answer to the complaint on September 12, 2007, and also filed a counterclaim against appellant seeking damages for trespass of animals and hunting without permission.

{¶13} Appellant amended his complaint to add a cause of action for negligence on March 12, 2008. The court entered summary judgment on appellant's negligence per se claim on June 24, 2008, finding that negligence per se cannot rest upon violation of a statute not specifically enacted to protect the public's safety, and because R.C. 959.02 is intended to protect personal property rather than public safety, violation of the statute cannot be negligence per se.

{¶14} The case proceeded to bench trial on appellant's claim for negligence and on appellee's counterclaim. Following trial, the court found in favor of appellee on the claim and the counterclaim. As to appellant's claim against appellee, the court found that appellee was not liable to appellant for damages under R.C. 1531.17(B), and complied with R.C. 955.28(A) in killing the dogs. The court further found that appellee was not negligent in shooting the dogs. The court found that pursuant to R.C. 955.28(B), appellant was liable to appellee for damages caused by his dogs and accordingly entered judgment in favor of appellee in the amount of \$1545.00.

{¶15} Appellant assigns two errors on appeal:

{¶16} “I. THE TRIAL COURT ERRED BY FINDING APPELLEE IMMUNE FROM LIABILITY UNDER OHIO REVISED CODE SECTION 1533.17(B) FOR WILLFULLY AND INTENTIONALLY KILLING APPELLANT’S DOGS.

{¶17} “II. THE JUDGMENT OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

I

{¶18} In his first assignment of error, appellant argues that the court erred in finding appellee immune from liability for shooting the dogs under R.C. 1533.17(B). Appellant also argues that the immunity provisions of R.C. 959.02 and 959.04 do not conflict with the immunity provisions of R.C. 1533.17(B), and the court erred in finding R.C. 959.04 inapplicable based on a conflict with R.C. 1533.17. Appellant also argues the court erred in finding that appellee was permitted to kill the dogs in accordance with R.C. 955.28(A).

{¶19} While the court did make findings concerning appellee’s immunity under R. C. 1533.17(B) and R.C. 955.28(A), the only cause of action pending before the court at the time of trial was based on common law negligence. Appellant’s cause of action for negligence per se was dismissed by the court on summary judgment, and appellant has not challenged this ruling on appeal.

{¶20} It is a fundamental rule of appellate review that we review judgments, not reasons. E.g. *Natland Energy Corp. v. East Ohio Gas Co.* (May 2, 1991), Tuscarawas App. No. 90AP060040, unreported. If there is any possible basis upon which the trial court could have reached the judgment that it did, we are required to affirm that

judgment notwithstanding that the trial court gave the wrong reasons. *Id.*, citing *Agricultural Insurance Co. v. Constantine* (1944), 144 Ohio St. 275, 284.

{¶21} In the instant case, while the trial court found appellee immune for shooting the dogs under R.C. 1533.17(B) and R.C. 955.28(A), the court also found that appellee was not negligent in shooting the dogs:

{¶22} “5. Defendant’s conduct was not negligent when he shot Plaintiff’s dogs on March 26, 2006. Negligence is a failure to use ordinary care. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances. Based on the evidence presented, the Court concludes that the Defendant used ordinary care, and acted as a reasonably careful person would have under similar circumstances, when he shot Plaintiff’s dogs to protect his livestock. Whether Plaintiff’s dogs were sufficiently trained or not, an ordinary person, in the Defendant’s position, would have viewed them to be a grave risk to the well being of his livestock.”

{¶23} Findings of Fact and Conclusions of Law, February 12, 2009, Conclusion of Law 5.

{¶24} Appellant has not challenged this conclusion of law on appeal. Therefore, even if we were to find that the court erred in finding appellee had statutory immunity, the judgment would still be affirmed on the basis that the court found appellee was not negligent. We therefore need not address appellant’s arguments concerning statutory immunity.

{¶25} The first assignment of error is overruled.

II

{¶26} In his second assignment of error, appellant argues the judgment of the trial court is against the manifest weight of the evidence. While appellant cites to multiple instances of conflicting testimony, he fails to argue as to how the court's resolution of the conflicting testimony resulted in a judgment against the manifest weight of the evidence, and fails to point to the findings of fact and conclusions of law which are not supported by the evidence.

{¶27} A judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. As the trier of fact, the judge is in the best position to view the witnesses and their demeanor in making a determination of the credibility of the testimony. “[A]n appellate court may not simply substitute its judgment for that of the trial court so long as there is some competent, credible evidence to support the lower court's findings.” *State ex rel. Celebrezze v. Environmental Enterprises, Inc.* (1990), 53 Ohio St.3d 147, 154, 559 N.E.2d 1335.

{¶28} Appellant's claim against appellee was for negligence. The essential elements of a negligence claim are duty, breach of that duty, and damage or injury as a proximate result of the breach. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284, 423 N.E.2d 467. Although in Ohio a landowner owes no duty to a trespasser or licensee except to refrain from willful, wanton or reckless conduct, and the trial court found the dogs were trespassing at the time they were shot, the trial court appears to have applied the duty of ordinary care which is traditionally applied only to an invitee.

See *Bennett v. Stanley*, 92 Ohio St.3d 35, 38-39, 748 N.E.2d 41, 2001-Ohio-128. Ordinary care is a degree of care that an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, under the same or similar circumstances. *Id.*

{¶29} The court's judgment finding appellee to not be negligent is supported by some competent, credible evidence. The trial court was in a better position than this court to judge the credibility of witnesses. Appellee testified that he saw the dogs running through his sheep before leaving the property. There was evidence presented by appellee and his expert witness, Bruce Baird, that sheep are easily "spooked" or worried. There was evidence that the dogs would be expected to come back having once run through the sheep. The evidence was undisputed that appellee was not informed about the coyote hunt. Appellee testified that he did not see the collars the dogs were wearing, did not know they were hunting, and did not see the dogs tracking a coyote. The dogs came back a second time to appellee's property. Appellee chased the dogs in the opposite direction from the sheep on his ATV, and shot them while chasing them away. Baird testified that a responsible shepherd would shoot a dog bothering his sheep. The evidence reflected that these were dogs capable of killing a coyote. Based on the evidence that appellee did not know where the dogs came from or why they were on his property, and the evidence that they ran through his sheep once and came back a second time, we cannot find that the trial court's judgment that appellee was not negligent in shooting the dogs was against the manifest weight of the evidence.

{¶30} Appellant also challenges the credibility of appellee's testimony concerning the damage to his sheep caused by the dogs. Appellant argues that

appellee did not report the injuries to the sheep to Deputy Razler and produced no supporting documentation concerning the damage to his sheep.

{¶31} Appellee testified extensively concerning the damage to specific sheep that were crippled by the dogs, “went crazy” after the dog attack, and aborted lambs after the attack. He testified concerning the number of lambs lost from the stress of the dogs running the sheep and testified to the prices he was required to sell several damaged sheep for compared to the price he normally could have received for the sheep. Baird also testified as to the long-lasting effects on a flock that has been run by dogs and testified concerning the reasonable price for sheep. The judge’s findings concerning the damages to the sheep as a result of being run by the dogs is supported by competent, credible evidence.

{¶32} The second assignment of error is overruled.

{¶33} The judgment of the Licking County Municipal Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/r1007

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD D. MIZER	:	
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Plaintiff-Appellant	:	
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-vs-	:	JUDGMENT ENTRY
	:	
AARON LEE SMITH, SR.	:	
	:	
Defendant-Appellee	:	CASE NO. 09-CA-00026

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Municipal Court is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/ William B. Hoffman

JUDGES