

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 30th day of October, 2009.

Joanna Renee Browning, Appellant,

against Record No. 081906
Circuit Court No. CL06000185-00

John R. East, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Montgomery County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is reversible error in the judgment of the trial court.

Joanna Renee Browning ("Browning") was driving with her 11-year old daughter as a passenger on Route 8 in Montgomery County when she collided with a cow owned by John R. East ("East"). The collision occurred around 7:45 p.m. on a dark but clear night, on a straight stretch of road that was not illuminated by artificial lighting. According to Browning, the night was "all the way dark." In the area of the collision, Route 8 is a two-lane road without turns or visual obstructions for approximately one-tenth of a mile from the direction from which Browning was driving to the site of the collision.

Although Browning testified at trial that she was traveling between 45 and 50 m.p.h., she conceded on cross-examination that in an earlier deposition she had admitted her speed was between 57 and 60 m.p.h. The speed limit in that area is 55 m.p.h. Browning also stated that she had her high-beam headlights "on bright" before and

leading up to the collision, and that her headlights had passed inspection and were in working order.

Browning testified that her headlights illuminated the glare of an animal's eyes ahead of her on the road. The rest of the animal appeared to be black against a dark road on a very dark evening. When she first saw the animal's eyes, Browning was about 30 to 40 feet away from it. She immediately engaged her brakes, but could not avoid striking the animal, which she subsequently discovered was a cow. Browning stated that the cow was "standing" stationary in the middle of the road, with its front legs on one side of the double yellow dividing line and the middle and rear of its body on the side in which Browning was traveling. The cow survived, but it was later determined that the car was a total loss because of a bent frame. The cow, of the Black Angus breed, weighed about 350 pounds at the time of the accident, and was black in color.

At trial, Alfred Vaden ("Vaden"), a retired Montgomery County Animal Control Officer, testified for Browning that he had several encounters with East, all stemming from instances of animals owned by East straying from his property adjacent to Route 8. Vaden stated that on one occasion in the late 1990s, he contacted East about a young bull that had wandered down a long driveway from East's property to a garage along Route 8, and that three or four years later, a full-grown bull strayed from East's property and was found on the "verge" of Route 8, where it could easily have roamed onto the road. Vaden testified that on both occasions, he explained the law to East, who acknowledged that the animals in question belonged to him. East, who testified by deposition at

trial due to illness, conceded that cattle had previously escaped from his property on Route 8, that he had been contacted about it by Vaden, that he knew it was his responsibility to keep his cattle fenced in, and that cattle have a tendency to escape confinement.

Browning also made a proffer of testimony about cattle owned by East that had strayed from East's other properties in the county, and about dogs that had strayed from East's Route 8 property. The trial court refused to allow this testimony, holding that it was not relevant because it dealt with animals and properties other than those involved in Browning's collision.

At the end of trial, East sought and obtained, over Browning's objection, a number of jury instructions relating to contributory negligence. These instructions dealt specifically with a driver's duties of ordinary care (Instruction No. 16), a driver's duty to keep a proper lookout (Instruction No. 17), specifications for properly functioning vehicle headlights (Instruction No. 18), the maximum speed limit at the place of the collision (Instruction No. 19), the definition of contributory negligence (Instruction No. 20), and contributory negligence as a bar to recovery (Instruction No. 21).

After deliberation, the jury returned a verdict in favor of East. Browning moved to set aside the verdict, but the trial court denied the motion and entered final judgment for East. Browning was awarded an appeal on the following assignments of error:

1. The trial court erred in granting jury instructions relating to contributory negligence (Instructions 16, 17, 18, 19, 20, and 21).
2. The trial court erred in granting the defendant's motion in limine to exclude from the jury evidence of the

defendant's prior acts of allowing his livestock to stray at other locations.

Browning first argues that the trial court erred in giving Jury Instructions 16, 17, 18, 19, 20, and 21. This Court reviews the grant or denial of jury instructions for an abuse of discretion. See Stockton v. Commonwealth, 227 Va. 124, 145, 314 S.E.2d 371, 384 (1984). Here, all of the challenged instructions focused on the issue of contributory negligence. When a defendant seeks to avoid liability based on the plaintiff's negligence, the defendant has the burden to prove such negligence and that the negligence was a proximate cause of the plaintiff's injuries. Karim v. Grover, 235 Va. 550, 552, 369 S.E.2d 185, 186 (1988).

Browning first alleges a lack of sufficient evidence to support part of Instruction 16, describing a driver's duty to "keep a proper lookout," Instruction 17, which describes this duty as an obligation "to use ordinary care to look in all directions for vehicles that would affect her driving, to see what a reasonable person would have seen, and to react as a reasonable person would have acted to avoid a collision under the circumstances," and Instruction 18, which states, inter alia, the requirement that motor vehicles operated on highways have working high-beam headlights that illuminate "persons and objects" at least 350 feet ahead.

In Ring v. Poelman, 240 Va. 323, 328, 397 S.E.2d 824, 827 (1990), the Court rejected a contributory negligence instruction premised on failure to keep a proper lookout, because the evidence demonstrated that the layout of the collision site prevented any visual contact prior to the collision. Because any failure on the

part of the plaintiff to keep a proper lookout could not have caused the accident, there was insufficient evidence to support the instruction. Id.

Here, there was a similar lack of evidence as to causation. Although there was some testimony that suggested Browning might have been distracted while driving - Browning admitted she was talking with her daughter shortly before the collision - there was no evidence that such distraction could have been a proximate cause of the accident.

At trial and on appeal, East relied on Code § 46.2-1032, which states that high-beam headlights "shall be of sufficient intensity to reveal persons and objects at least 350 feet ahead." East did not introduce any evidence demonstrating that high-beam headlights would actually have illuminated a cow of this size and color on a night such as the one in question, at the location where the collision occurred, either at a distance of 350 feet or at any distance. Accordingly, Instructions 17 and 18, as well as the portion of Instruction 16 dealing with a proper lookout, should not have been given to the jury.

Browning next challenges the remaining portion of Instruction 16 which, *inter alia*, stated that a driver has a duty to "operate her vehicle at a reasonable speed under the existing conditions," and Instruction 19, which stated that Browning was negligent if she was driving in excess of the 55 mile-per-hour speed limit. Although Browning conceded on cross-examination that in her deposition she had admitted several times that she may have been driving 57 to 60 m.p.h., she argues that this deposition evidence was offered solely to impeach her testimony at trial that she

stayed within the speed limit, and therefore could not have been used as substantive evidence in the case.

Assuming there was substantive evidence that Browning exceeded the speed limit, East did not prove that such speeding was a proximate cause of the collision. In Hogan v. Carter, 226 Va. 361, 367, 310 S.E.2d 666, 669 (1983), the defendant was operating a motor vehicle in excess of the speed limits. The trial court ruled that the defendant had "convict[ed] himself of negligence on speeding" but that "the question of . . . proximate cause . . . should be presented to the trier of fact." The defendant argued that "slightly excessive speed when still 454 feet or more from the place of collision is immaterial unless it continued to a point close enough to the accident to have been a contributing cause of it." Id. In Hogan this Court approved the giving of an instruction that directed the jury that the defendant was negligent by exceeding the speed limit, but also submitted to the jury the question of proximate causation. Id. at 367-68, 310 S.E.2d at 669-70.

Here, East has failed to introduce sufficient evidence of proximate causation to justify the giving of contributory negligence instructions that relate to speed. Browning admitted she was violating the speed limit at the time she first saw the cow, driving 57 to 60 miles per hour in a 55-mile-per-hour speed zone. Consequently, to receive an instruction as to contributory negligence for excessive speed, East had to introduce evidence demonstrating that Browning hit the cow because she was traveling three to five miles per hour over the speed limit, and that she

would not have otherwise hit the cow. There is no evidence in the record to support this contention.

Indeed, the Virginia Code suggests the opposite conclusion. Code § 46.2-880 provides a table of baseline speed and stopping distances, of which "[a]ll courts shall take notice . . . in actions in which inquiry thereon is pertinent to the issues." The stopping distances it includes represent "an average baseline for motor vehicle stopping distances: (1) for a vehicle in good condition and (2) on a level, dry stretch of highway, free from loose material." The table indicates that at a speed of 55 m.p.h., the average stopping distance for automobiles (taking account of both reaction time and braking distance) is 265 feet, while at a speed of 60 m.p.h., the average stopping distance is 303 feet.

Here, Browning testified that she first saw the cow when she was only 30 to 40 feet away from it. As discussed above, there is no evidence in the record that she could have seen the cow from a greater distance. Even taking into account variations from the chart data based on site-specific deviations from the ideal conditions under which the data were obtained, these baseline stopping distances are all much greater than the 30 to 40 feet between Browning and the cow, suggesting that a small reduction in her speed, though bringing her within the speed limit, would not have prevented the accident. Accordingly, East's failure to introduce evidence that Browning's excessive speed proximately caused the collision dictates that East was not entitled to Instructions 16 and 19, and the trial court therefore erred in giving them.

Because the trial court erred in giving the theory-specific instructions discussed above, Browning contends that giving the general contributory-negligence instructions was likewise error. These include Instruction 20, defining contributory negligence, and Instruction 21, stating that contributory negligence will bar a recovery by the plaintiff. Because East failed to present a prima facie case of contributory negligence as to either Browning's alleged excessive speed or her failure to keep a proper lookout, the trial court erred in instructing the jury on the definition and operation of the doctrine of contributory negligence.

In her second assignment of error, Browning claims the trial court erred in granting East's motion in limine and excluding evidence of prior instances of cattle and dogs straying from other properties owned by East. Browning argues that the excluded evidence should have been admitted because it represented proof of prior similar occurrences, demonstrating that East had knowledge that his animals would stray from his property if not properly fenced.

Here, the admitted evidence included East's deposition testimony that cattle had previously escaped from the property at issue here despite his efforts to prevent this, and that Officer Vaden had contacted him about at least one such incident. This evidence, which was properly admitted by the trial court, was sufficient to demonstrate that East had notice that his cattle had a tendency to stray and that allowing them to do so was prohibited by law. However, because the excluded evidence would not have related either to notice or actual knowledge of escaping cows at

the location of the accident, the trial court did not abuse its discretion in excluding it.

Accordingly the judgment of the circuit court is affirmed in part, reversed in part, and the case is remanded for a new trial.

This order shall be certified to the said circuit court.

JUSTICE GOODWYN dissents.

A Copy,

Teste:

*original order signed by the
Clerk of the Supreme Court of
Virginia at the direction of the
Court*