IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

EARL DAVID STINSON,	)	
	)	
Plaintiff/Appellee,	)	
	)	Wilson Circuit
	)	No. 8871
VS.	)	
	)	Appeal No.
	)	01A01-9601-CV-00036
RANDY CARPENTER and	)	
JAMES A. EALY,	)	
Executor for the estate of	)	
WILLIAM L. PEARSON,	)	
	)	
Defendants/Appellants.	)	

APPEAL FROM THE CIRCUIT COURT FOR WILSON COUNTY
AT LEBANON, TENNESSEE

THE HONORABLE BOBBY CAPERS, JUDGE

For the Plaintiff/Appellee:

Mary Sullivan Warwick
BREWER, KRAUSE, BROOKS & MILLS
Nashville, Tennessee

For the Defendants/Appellants:

Larry Kirk Tolbert
Murfreesboro, Tennessee

C. Tracey Parks
Gallatin, Tennessee

AFFIRMED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves a collision between a truck and an American bison. The truck's owner filed suit in the Circuit Court for Wilson County for the damages to his truck and for lost wages. The trial court heard the evidence without a jury and awarded the truck owner a $16,300 judgment against the estate of the person found to be the bison's owner. The estate asserts on this appeal that the evidence does not support the trial court's conclusions with regard to either the bison's ownership or the decedent's negligence. We have determined that the evidence fully supports the trial court's decision and, therefore, affirm the judgment.

I.

Dr. William L. Pearson owned a one thousand acre farm in Rutherford County. He purchased eleven American bison in late 1990 but decided to sell them several months later. Randy Carpenter agreed to purchase Dr. Pearson's bison and to be responsible for rounding up the bison and transporting them to his farm. Mr. Carpenter owned the largest herd of bison in neighboring Wilson County and was widely recognized in the area as an expert in raising bison.

Mr. Carpenter first attempted to round up the eleven bison on February 24, 1991 but succeeded in capturing only four bison cows. He returned to Dr. Pearson's farm several more times but was unable to round up the rest of the herd. Eventually, by using an airplane and several all-terrain vehicles, Mr. Carpenter and his employees succeeded in rounding up the remaining seven bison and were driving them toward Dr. Pearson's corral when Dr. Pearson mistakenly opened a gate permitting the bison to escape. The bison scattered.

The record contains no evidence that Dr. Pearson ever attempted to locate or capture the bison after they escaped. Mr. Carpenter never returned to Dr. Pearson's farm and never succeeded in capturing the escaped bison even though he responded to four or five calls from other persons living in the area who

discovered the bison in their barns or fields. At one point, Mr. Carpenter received a telephone call concerning a bull bison at the Cedars of Lebanon State Park and later heard that someone in Woodbury had killed several bison that were roaming at large.

At approximately 11:00 p.m. on July 17, 1991, Earl David Stinson struck and killed a bull bison that had wandered onto Highway 231. The collision occurred twelve miles south of Lebanon near the Cedars of Lebanon State Park and approximately twenty miles from Dr. Pearson's farm. Mr. Stinson was traveling fifty miles per hour and was unable to apply his brakes because he first saw the bison only moments before impact. The investigating trooper determined that Mr. Stinson had been driving properly at the time of the accident.

Mr. Stinson was an independent truck driver who made his living with his truck. He spent $10,000 to repair the damage to his truck and also lost $6,300 in income because he was unable to work for three weeks while his truck was being repaired. In January 1994, he filed suit against both Mr. Carpenter and Dr. Pearson. The trial court granted a summary judgment dismissing Mr. Stinson's claims against Mr. Carpenter and later awarded Mr. Stinson a $16,300 judgment against Dr. Pearson's estate.[1] Dr. Pearson's executor has appealed from the $16,300 judgment.[2]

II.

THE OWNERSHIP OF THE BISON

The executor of Dr. Pearson's estate asserts that the evidence does not support the trial court's conclusion that the bison struck by Mr. Stinson was one of the bison that escaped from Dr. Pearson's farm. He argues that the evidence concerning the bison's ear tags and brands required the trial court to find that Dr. Pearson did not own the bison struck by Mr. Stinson. The evidence with regard

[1]Dr. Pearson died while this lawsuit was pending.

[2]Mr. Stinson has not appealed from the summary judgment dismissing his claims against Mr. Carpenter.

to the brands and ear tags is not altogether consistent but, when considered in light of all the other circumstantial evidence of ownership, does not provide a sufficient basis for overturning the trial court's conclusion.

A.

Judges and lawyers frequently recite the standard of review with regard to factual findings in civil cases heard without a jury. Tenn. R. App. P. 13(d) requires the reviewing court to review the record de novo and to presume that the trial court's findings of fact are correct "unless the preponderance of the evidence is otherwise." Notwithstanding the familiarity of these words, an accurate understanding of the concept of "preponderance of the evidence" can be elusive.

Reviewing factual determinations under Tenn. R. App. P. 13(d) is essentially a weighing process that requires the court to determine in which party's favor the weight of the aggregated evidence falls. *See Coles v. Wrecker*, 2 Tenn. Cas. (Shannon) 341, 342 (1877); *Hohenberg Bros. Co. v. Missouri Pac. R.R.*, 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979). There is a "reasonable probability" that a proposition is true when there is more evidence in its favor than there is against it. *Chapman v. McAdams*, 69 Tenn. 500, 506 (1878); 2 John W. Strong et al., *McCormick on Evidence* § 339, at 439 (4th ed. 1992) (stating that "the existence of a contested fact is more probable than its nonexistence"). Thus, the prevailing party is the one in whose favor the evidentiary scale tips, no matter how slightly. *Hills v. Goodyear*, 72 Tenn. 233, 236-37 (1880); *Chapman v. McAdams*, 69 Tenn. at 503.

The operation of the preponderance of the evidence standard does not change when circumstantial evidence is involved. Circumstantial evidence cases also require courts to weigh the probabilities. When the determination of a factual issue in a civil case depends on circumstantial evidence, the party with the burden of proof need only present evidence that its version of the facts is more probable than its adversary's. Its evidence need not exclude every other reasonable conclusion. *Bryan v. Aetna Life Ins. Co.*, 174 Tenn. 602, 610, 130 S.W.2d 85, 88

(1939); *Hollingsworth v. Queen Carpet, Inc.*, 827 S.W.2d 306, 309 (Tenn. Ct. App. 1991); *Benson v. H. G. Hill Stores, Inc.*, 699 S.W.2d 560, 563 (Tenn. Ct. App. 1985).

The presumption of correctness contained in Tenn. R. App. P. 13(d) also influences the standard of review. It requires appellate courts to give great weight to a trial court's factual findings. *Taylor v. Trans Aero Corp.*, 924 S.W.2d 109, 112 (Tenn. Ct. App. 1995); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). Because of the presumption we are bound to leave a trial court's factual findings undisturbed unless we determine that the aggregate weight of the evidence demonstrates that a factual proposition other than the one found by the trial court is more probably true. *See Estate of Haynes v. Braden*, 835 S.W.2d 19, 20 (Tenn. Ct. App. 1992) (holding that an appellate court is bound to respect a trial court's findings if it cannot determine that the evidence preponderates otherwise). Thus, in order for the evidence to preponderate against a trial court's factual finding, it must support another factual finding with greater convincing effect.

B.

There is little room to dispute that Dr. Pearson's bison had ear tags when they were delivered. Dr. Pearson purchased the bison from an out-of-state breeder, and they could not have been shipped from one state to another without ear tags showing that they had been properly vaccinated. While it does not necessarily follow that the bison still had ear tags in February 1991, Mr. Carpenter testified unequivocally at trial that the four bison he obtained in February 1991 had ear tags. It is equally undisputed that the bison involved in the collision did not have ear tags. Mr. Stinson and the investigating trooper, the only witnesses who testified on this point, testified that they did not see ear tags on the dead bison.

The evidence concerning the brands on Dr. Pearson's bison is less clear. Dr. Pearson's helper stated that he did not see brands when the bison were

delivered late in 1990. However, Mr. Carpenter, the only acknowledged bison expert who testified, stated that the bison's thick winter coat would have obscured their brands if they had them. The helper acknowledged the bison "had a lot of hair" and that his observations were based on his experience with cattle, not bison. The evidence concerning whether the bison struck by Mr. Stinson had a brand is similarly unclear because of the discrepancy between the testimony of Mr. Stinson and the testimony of the investigating trooper. Mr. Stinson testified that the bison had a circular brand on its right hip approximately six inches in diameter; while the trooper testified that he examined the bison for identifying brands or other marks but found none.

The evidence concerning the brands is contradictory and inconclusive. It could not have assisted the trial court in determining whether the bison struck by Mr. Stinson was one of the bison that escaped from Dr. Pearson's farm. On the other hand, the evidence concerning the ear tags indicates that Dr. Pearson's bison had ear tags while the bison struck by Mr. Stinson did not. Accordingly, we must decide whether this single circumstance, considered in light of all the other circumstances, requires us to set aside the trial court's conclusion that the bison struck by Mr. Stinson was one of the escaped bison.

The evidence concerning the ownership of the bison struck by Mr. Stinson is entirely circumstantial. The lapse of time between the bison's escape and the collision and the absence of an ear tag tend to weaken the conclusion that the bison Mr. Stinson struck was not one of the escaped bison. On the other hand, the record contains evidence of circumstances that tend to support the conclusion that Mr. Stinson struck one of Dr. Pearson's bison. Bison are not common in Wilson and Rutherford Counties and are owned by only a few persons. Mr. Carpenter, who would have heard about escaped bison in the area, knew of no other escaped bison during this time. Bison were capable of roaming from Dr. Pearson's farm to the scene of the collision. Finally, there were no reports prior to the accident that all the escaped bison had been captured or killed. After weighing all these circumstances, we cannot say that the evidence preponderates against the trial court's finding that Mr. Stinson struck one of Dr. Pearson's escaped bison.

III.

DR. PEARSON'S NEGLIGENCE

The executor of Dr. Pearson's estate asserts that Dr. Pearson was not negligent and, even if he was, that his conduct did not proximately cause the collision between Mr. Stinson's truck and the bison. We have determined that the evidence supports the trial court's conclusion that Dr. Pearson's conduct was negligent and that it proximately caused Mr. Stinson's damages.

The owner of a domesticated animal may be held liable for the harm the animal causes if he or she negligently failed to prevent the harm. Restatement (Second) of Torts § 518(b) (1977). Thus, the owner of a domesticated animal must exercise such reasonable care to prevent the animal from injuring another as an ordinarily careful and prudent person would exercise under the same circumstances. *Groce Provision Co. v. Dortch*, 49 Tenn. App. 57, 67, 350 S.W.2d 409, 413 (1961). The owner cannot permit the animal to run at large, Tenn. Code Ann. § 44-8-401(a) (1993); *Overby v. Poteat*, 206 Tenn. 146, 151, 332 S.W.2d 197, 200 (1960); *Wilson v. White*, 20 Tenn. App. 604, 607, 102 S.W.2d 531, 533-34 (1936), and cannot knowingly or negligently permit the animal to escape and fail to make reasonable efforts to capture it. *See Way v. Bohannon*, 688 S.W.2d 89, 91 (Tenn. Ct. App. 1985); *Troutt v. Branham*, 660 S.W.2d 502, 505 (Tenn. Ct. App. 1983); *Groce Provision Co. v. Dortch*, 49 Tenn. App. at 67, 350 S.W.2d at 413.

Mr. Carpenter and Dr. Pearson agreed that Mr. Carpenter would be solely responsible for capturing the bison and removing them from Dr. Pearson's farm. Mr. Carpenter was an acknowledged expert in bison behavior and thus did not expect or anticipate help from Dr. Pearson. On the day the bison escaped, Dr. Pearson remained in his house while Mr. Carpenter and his employees rounded up the bison and herded them toward Dr. Pearson's corral. Dr. Pearson emerged from

his house just as the bison approached the corral and opened one of the gates believing that he was helping Mr. Carpenter. Opening the gate had precisely the opposite effect; it permitted the bison to escape. There is no evidence of Dr. Pearson's efforts to recover the bison. As far as the record shows, Mr. Carpenter is the only person who attempted to recapture the bison.

The evidence supports the trial court's conclusion that Dr. Pearson was negligent in permitting the bison to escape and in failing to recapture them. He had a duty to keep his domesticated bison from running at large and to refrain from interfering with Mr. Carpenter's efforts to round up the bison. He breached this duty by opening the gate, and opening the gate was the proximate cause of the bison's escape. After the bison escaped, Dr. Pearson, as their owner, owed a duty to the public to exert reasonable efforts to recapture them. The absence of evidence of Dr. Pearson's efforts to recover the bison warrants the conclusion that he breached his duty.

In order to recover in a negligence case, the plaintiff must show some reasonable connection between the defendant's conduct and the plaintiff's injury. The legal phrase that best describes this reasonable connection is "proximate cause." *Bain v. Wells*, ___ S.W.2d ___, ___ (Tenn. 1997).[3] The courts use the proximate cause concept to define the limits of an actor's liability for the consequences of his or her conduct. *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993). Conduct will not be considered to be the proximate cause of an injury unless (1) the conduct was a substantial factor in bringing about the injury, (2) the injury could have been reasonably foreseen by a person of ordinary intelligence, and (3) no rule or policy exists relieving the actor from liability. *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991).

Conduct need not immediately precede an injury in order to be considered the proximate cause of the injury. *Solomon v. Hall*, 767 S.W.2d 158, 161 (Tenn. Ct. App. 1988). The "cause in fact" requirement is satisfied as long as the conduct

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[3] *Bain v. Wells*, App. No. 01S01-9603-CV-00049, 1997 WL 9056, at *7 (Tenn. Jan. 13, 1997).

produced the injury in continuous sequence, and the injury would not have occurred had the conduct not occurred. *Pichon v. Opryland USA, Inc.*, 841 S.W.2d 326, 329 (Tenn. Ct. App. 1992). The foreseeability requirement is satisfied if the general manner in which the injury occurred, rather than the exact manner in which the injury takes place, is reasonably foreseeable. *McClenahan v. Cooley*, 806 S.W.2d at 775.

The circumstances of this case satisfy the foreseeability requirement. Persons of ordinary intelligence can reasonably foresee that domesticated animals that are permitted to escape and remain at large could wander onto public roadways. They can also reasonably foresee that a motorist traveling at night on a public road in a rural area might strike an escaped animal that has wandered onto the road. Mr. Stinson would not have struck the bison on Highway 231 had it not escaped from Dr. Pearson's farm. Since no principle or policy relieves owners of domesticated animals from liability under the circumstances of this case, the trial court did not err in finding that Dr. Pearson's negligence in permitting the bison to escape and to remain at large was the proximate cause of Mr. Stinson's damages.

IV.

THE PHANTOM TORTFEASOR

As a final matter, the executor of Dr. Pearson's estate asserts that Dr. Pearson was not liable for Mr. Stinson's damages because the evidence indicates that some unknown person, a "phantom tortfeasor," must have captured and exercised control over the bison after it escaped and, therefore, that this person's intervening negligence broke the causal connection between Dr. Pearson's conduct and Mr. Stinson's injuries. We find little basis for this claim.

The phantom tortfeasor theory rests on the executor's creative interpretation of the evidence concerning the brands and ear tags. He suggests that some unknown person must have captured the bison after it escaped and must have branded the bison and taken off the ear tag because the bison that escaped from

Dr. Pearson's farm had an ear tag but not a brand. He also suggests that the bison must have escaped from this unknown person and that the unknown person must have been negligent in permitting the bison to escape and remain at large. Based on these suggestions, he asserts that the negligent conduct of this unknown person was the superseding, intervening cause of Mr. Stinson's injuries.

The phantom tortfeasor theory rests on an unwarranted interpretation of the evidence. We have already pointed out that the evidence concerning the brands on the bison has little probative value. The fact that the bison that Mr. Stinson struck did not have an ear tag does not necessarily indicate that it was controlled by anyone else after it escaped from Dr. Pearson's farm. It is equally possible that the bison's ear tag was removed before it escaped, that it became dislodged after it escaped, or that it became dislodged during the collision with Mr. Stinson's truck. Accordingly, we cannot find fault with the trial court's failure to conclude that a phantom tortfeasor, rather than Dr. Pearson, was responsible for Mr. Stinson's damages.

V.

We have determined that the evidence in the record does not preponderate against the trial court's factual conclusions. Accordingly, we affirm the $16,300 judgment and remand the case to the trial court for whatever other proceedings may be required. We also tax the costs of this appeal to the estate of William L. Pearson and its surety for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

SAMUEL L. LEWIS, JUDGE