

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**MAC'S TRUCKING, INC., a Nebraska corporation, and MARK A. MEYERS,**  
Plaintiffs-Appellants,

vs.

**JOHN R. JOCHEM and DOROTHY JOCHEM,**  
Defendants-Appellees.

Case No. 6822

**MEMORANDUM OPINION  
AND JUDGMENT ON APPEAL**

**DATE OF HEARING:** July 14, 1999.

**DATE OF DECISION:** July 19, 1999.

**APPEARANCES:**

For plaintiff: D. Eugene Garner without plaintiffs.

For defendant: Rodney J. Palmer without defendants.

**SUBJECT OF ORDER:** Appeal from the County Court of Brown County, Nebraska, in Case No. CI97-47.

**MEMORANDUM OPINION:**

1. This is an appeal from the county court. In cases where the district court sits as an intermediate appellate court, the district court reviews the county court judgment for error appearing on the record made in the county court. *State v. Hopkins*, 7 Neb. App. 895, 587 N.W.2d 408 (1998).

2. The plaintiffs asserted that defendants were negligent. The plaintiffs claimed that the defendants were moving cattle from a ranch south of Ainsworth along Highway 7. The plaintiffs also alleged that the defendants herded cattle onto the highway in a no-passing zone and failed to warn oncoming motorists or take other precautions to prevent a collision. The plaintiffs' semi-tractor and trailer reached the hilltop just south of the accident site, at which point the driver observed the cattle on the road and on both sides of the road ditches. Although the driver testified that he applied his brakes and sounded his horn, the unit struck several head of cattle. The collision damaged the unit, necessitating repairs and causing a loss of income during the repairs. At the close of the plaintiffs' evidence, the county court

sustained the defendants' motion for directed verdict. The plaintiffs filed a motion for a new trial, which was denied. The plaintiffs appeal.

3. No separate statement of errors was filed in this court in compliance with Uniform District Court Rule 18 (formerly codified as Rule 17).

a. Although the plaintiffs submitted a brief, plaintiffs' counsel confirmed at oral argument that the plaintiffs were not relying upon the brief in substitution for a statement of errors. The court assumes that counsel overlooked the requirement for filing of a statement of errors.

b. In the absence of a statement of errors, review on appeal is limited to plain error. *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995); *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993).

c. However, the plaintiffs did make some assertion of error in the notice of appeal filed in the county court. The notice states that the appeal is taken from the order denying plaintiffs' motion for new trial, and goes on to recite that the motion asserted that:

the verdict, report, or decision rendered on January 29, 1999, granting the [d]efendants' motion for directed verdict against the [p]laintiff[s] and in favor of the [d]efendants (said verdict, report or decision having been journalized and filed by the [c]ourt on February 3, 1999) is not sustained by sufficient evidence, or is contrary to law.

(T21)

d. In *State v. Nelson*, 2 Neb. App. 289, 509 N.W.2d 232 (1993), the Nebraska Court of Appeals held that an appellant who incorporated a properly drafted statement of errors directly into a notice of appeal from a judgment of the county court satisfied the requirement concerning the timely filing of a statement of errors with the district court.

e. However, in *State v. Boye*, 1 Neb. App. 548, 499 N.W.2d 860 (1993), the Court of Appeals stated that the district court's review is limited to errors properly assigned in the statement of errors, and general statements made in a notice of appeal to the district court such as "conviction contrary to law" or "evidence improperly entered over objection" do not properly assign error and need not be considered by the district court, nor will they be considered by a higher appellate court.

f. In light of the foregoing authorities, this court concludes that its review is limited to (1) the single error properly assigned in the notice of appeal, specifically, that the county court erred in granting a directed verdict, and, (2) otherwise examining the record for plain error.

4. The county court granted the defendants' motion for directed verdict, stating:

That Mark Myers had an unobstructed and a clear view of a hazard on the roadway for – the evidence is 600 feet or 500 feet – approximately five to 600 feet and that he did not apply brakes, and that that act on his part to immediately apply brakes when a hazard comes into view is one of the causes of the collision. . . . And on the other hand, immediately applying the brakes certainly would give the operator of the vehicle a chance to slow it down enough to . . . enter the areas where there weren't any cattle and getting his truck down to a lower speed was certainly . . . an available choice and he didn't do that. . . .

(304:20-306:1) Thus, the county court essentially found that, as a matter of law, the negligence of the plaintiffs was equal to or greater than that of the defendants.

5. Of course, because the trial was conducted to the court without a jury, the motion for directed verdict actually constituted a motion for dismissal. However, each motion has the same legal effect. *Akins v. Chamberlain*, 164 Neb. 428, 82 N.W.2d 632 (1957); *Brown v. Slack*, 159 Neb. 142, 65 N.W.2d 382 (1954). The difference in terminology makes no difference in the result. See also *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

6. This court must apply several familiar principles of law.

a. In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Lackman v. Rousselle*, 257 Neb. 87, \_\_\_ N.W.2d \_\_\_ (1999).

b. A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Id.*

c. On appeal from an order of a trial court dismissing an action at the close of plaintiff's evidence, the appellate court must determine whether the cause of action was proved and must accept plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Russell v. Norton*, 229 Neb. 379, 427 N.W.2d 762 (1988).

d. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State ex rel. City of Alma v. Furnas County Farms*, 257 Neb. 189, \_\_\_ N.W.2d \_\_\_ (1999).

7. With respect to the defendant Dorothy Jochem, there simply was no evidence that she was in charge of the cattle or evidence of direct negligence on her behalf.

a. Viewed most favorably to the plaintiffs, the evidence shows that defendant John R. Jochem was the "manager" in charge of the cattle. There is absolutely no evidence that Dorothy Jochem was a "manager" or the owner of any of the cattle, or in any other way responsible in fact or in law for the control of the cattle. The evidence fails to show that Dorothy Jochem exercised any decision-making authority regarding the choice of means or methods in moving the cattle.

b. Essentially, the plaintiffs seem to rely upon her status as John R. Jochem's wife as a source of responsibility or liability. In this respect, the case bears some similarity to the recent case of *Lackman v. Rousselle*, 257 Neb. 87, \_\_\_ N.W.2d \_\_\_ (1999). There is simply no evidence of a duty imposed upon Dorothy Jochem, as owner, manager, bailee, lessee, or any other similar relationship, regarding these cattle. Her status as John Jochem's wife does not provide that missing link. Simply stated, there is no legal theory upon which to impute to Dorothy Jochem any negligence of John R. Jochem.

c. As to her presence and direct connection in the day's activities, there is no evidence of any direct negligence on her part.

d. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Lawry v. County of Sarpy*. 254 Neb. 193, 575 N.W.2d 605 (1998). A proper result will not be reversed merely because it was reached for the wrong reasons. *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997).

e. While the county court did not articulate its ruling regarding Dorothy Jochem in this precise language, there were aspects of the court's ruling which may be viewed in that light. In any case, as to Dorothy Jochem, the county court's ruling was correct and must be affirmed.

8. With regard to defendant John R. Jochem, the situation differs. Clearly, viewed in the light most favorable to the plaintiffs, evidence supports the conclusion that he was in charge of the means and methods of moving the cattle on the highway.

9. Although the county court recited the correct standard of decision, the findings show that the court erred in failing to accept plaintiffs' evidence as true, together with reasonable conclusions deducible from that evidence.

a. Plaintiff Mark A. Myers (not Meyers as stated in pleadings) testified that he first observed the cattle eight or nine truck lengths away, and that his truck was 60 feet long. On the defendant's motion for directed verdict, the court was required to view that evidence most favorably to plaintiffs. For purposes of ruling on the motion, the court could assume a distance of no more than 480 feet, i.e. eight truck lengths. As noted, the court concluded the distance was 500 to 600 feet.

b. The county court concluded that the Myers failed to immediately apply his brakes upon first observing the cattle. Viewing Myers' testimony most favorably to the plaintiffs and giving the plaintiffs the benefit of every inference arising therefrom, such testimony may be viewed as, at the very least, implying, if not actually positively stating, that he did immediately apply brakes.

c. In addition, the county court at least impliedly found that there was some area, either on or off the main road surface, where there were no cattle and into which Myers could have steered his vehicle. Accepting Myers' testimony as true and giving him the benefit of every reasonable conclusion deducible from that evidence, the county court was bound to accept the opposite conclusion for purposes of ruling on the motion.

10. At oral argument, the defendants' attorney extensively argued the evidence which would support a trier of fact in reaching the conclusions made by the county court. That, however, is not the proper function of the court in ruling on a motion for directed verdict. The court's inquiry on such a motion focuses on the evidence in favor of the nonmoving party, accepts such evidence as true, extends all reasonable inferences arising therefrom in favor of the nonmoving party, and determines whether reasonable

minds could differ on the conclusion so as to support a decision for the nonmoving party when so viewed. If so, as in this instance, the motion for directed verdict must be overruled. The county court erred in failing to overrule the motion of defendant John R. Jochem for a directed verdict.

11. The Nebraska Supreme Court, in *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996), considered the effect of adoption of the “new” comparative negligence standard upon Nebraska jurisprudence in that subject area. The lesson of *Traphagan* is that apportionment of fault is almost always for the trier of fact. In this bench trial, the county court would have performed that function upon submission at the end of the trial. However, the court was not permitted to so view the evidence upon motion for directed verdict at the close of the plaintiffs’ evidence. See also *Schiffert v. Niobrara Valley Elec. Memb. Corp.*, 250 Neb. 1, 547 N.W.2d 478 (1996).

12. The judgment dismissing the plaintiffs’ petition as to defendant John R. Jochem must be reversed, and the cause remanded for a new trial as to said defendant only. *Lucas v. Lucas*, 138 Neb. 252, 292 N.W. 729 (1940).

**JUDGMENT:**

IT IS THEREFORE ORDERED AND ADJUDGED  
that:

1. The judgment of the county court is **AFFIRMED IN PART** concerning the dismissal as to defendant Dorothy Jochem, and **IN PART REVERSED AND REMANDED FOR A NEW TRIAL** as to defendant John R. Jochem.

2. Costs on appeal are taxed to the defendant-appellee John R. Jochem.

3. Unless notice of appeal and deposit of docket fee is made on or before August 18, 1999, the clerk of this court shall issue the mandate to the county court on August 19, 1999 showing that the judgment was “**AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR NEW TRIAL.**” If such notice of appeal and docket fee are timely filed and deposited, the mandate shall not be issued until receipt of the mandate of the higher appellate court and in accordance with the order of the court spreading mandate thereon.

Entered: July 19, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this opinion and judgment to all counsel of record.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Deliver a certified copy hereof to county court.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : When appropriate, issue mandate in accordance with paragraph 3 of judgment.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 7/19/99 Signed "Memorandum Opinion and Judgment on Appeal" entered wherein judgment of county court is Affirmed In Part, and In Part Reversed and Remanded For New Trial.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge