REL: May 29, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180649

Christopher M. Blankenship, as Commissioner of the Alabama Department of Conservation and Natural Resources, and Charles F. Sykes, Director, Wildlife and Freshwater Fisheries Division

v.

Terry Kennedy and Johnny McDonald

Appeal from Montgomery Circuit Court
(CV-18-901056)

MITCHELL, Justice.

"Deer hunters like big deer. The bigger the rack, the better." That is how counsel for deer breeders Terry Kennedy

and Johnny McDonald ("the deer breeders") explained this lawsuit to the trial court. The deer breeders seek to raise and hunt bigger deer by artificially inseminating whitetail deer with mule-deer semen. Whether they may do so depends on whether the resulting hybrid deer are covered by the definition of "protected game animals" in § 9-11-30(a), Ala. Code 1975.

On a motion for a judgment on the pleadings, the Montgomery Circuit Court concluded that, because the hybrid deer are the offspring of a female whitetail deer, they are "protected game animals," both by virtue of the inclusion in that definition of "whitetail deer ... and their offspring," § 9-11-30(a), and by virtue of an old legal doctrine called partus sequitur ventrem. The trial court therefore entered a judgment in favor of the deer breeders. We disagree. Because the modifier "and their offspring" in § 9-11-30(a) does not reach back to apply to the term "whitetail deer," and because the Latin maxim cited as an alternative theory for relief has no application in this case, we reverse and remand.

Facts and Procedural History

Terry Kennedy is a licensed deer breeder who does business as Southern Yankees Whitetail Farm, LLC. Johnny McDonald is a licensed deer breeder who does business as J.M. Deer Farm. Before May 2017, the deer breeders used imported mule-deer semen to artificially inseminate whitetail deer and produce hybrid offspring. In May 2017, the Alabama Department of Conservation and Natural Resources ("the Department") circulated a letter to all Alabama game breeders taking the position that hunting mule-deer hybrids is prohibited by § 9-11-503, Ala. Code 1975 ("It shall be unlawful for any person to hunt or kill, attempt to hunt or kill, or offer the opportunity to hunt or kill any species of animal nonindigenous to the state ...."). The deer breeders disagreed with the Department's interpretation of the law.

On June 7, 2018, Kennedy sued Christopher M. Blankenship, in his official capacity as Commissioner of the Department, and Charles F. Sykes, Director of the Wildlife and Freshwater Fisheries Division of the Department (Blankenship and Sykes are hereinafter referred to collectively as "ADCNR"), seeking a judgment declaring that the offspring produced by the

artificial insemination of female whitetail deer with semen of a male mule deer are "protected game animals" under Alabama law and that, as such, they may be hunted and otherwise treated like whitetail deer. McDonald was added as a plaintiff in an amended complaint on July 25, 2018. After both sides moved for a judgment on the pleadings, the trial court held a hearing on September 12, 2018. On February 25, 2019, the trial court entered a judgment in favor of the deer breeders. The trial court offered two reasons for its decision -- first, that the hybrid deer are covered by the statutory definition of "protected game animals" because they are "whitetail deer ... and their offspring," and second, that the hybrid deer are legally considered to be whitetail deer by reason of the doctrine of partus sequitur ventrem. On March 5, 2019, the trial court issued an order clarifying that its February 25 order was a final judgment disposing of all issues in the case. ADCNR timely appealed.

Standard of Review

"A judgment on the pleadings is subject to a de novo review." Universal Underwriters Ins. Co. v. Thompson, 776 So. 2d 81, 82 (Ala. 2000) (citing Harden v. Ritter, 710 So. 2d

1254, 1255 (Ala. Civ. App. 1997)). When considering a motion for a judgment on the pleadings, a court may not consider materials outside the pleadings. Stockman v. Echlin, Inc., 604 So. 2d 393, 394 (Ala. 1992).[1]

Analysis

The trial court based its judgment on its interpretation of the definition of "protected game animals" in § 9-11-30(a) and on the doctrine of partus sequitur ventrem. The order was erroneous on both grounds. We address them in turn.

A. Statutory Interpretation

We begin with the text. When interpreting a statute, this Court "looks to the plain meaning of the words as written by the legislature." DeKalb Cty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 275 (Ala. 1998). We do so because that is the only approach to statutory interpretation consistent with our constitutional role. "To the end that the government of the State of Alabama may be a government of laws and not of

[1]ADCNR argues that the trial court improperly considered materials outside the pleadings, thus converting the deer breeders' motion for a judgment on the pleadings to a motion for a summary judgment. Because ADCNR did not place those materials in the record, and because we conclude that the trial court's order is otherwise erroneous, we need not consider that argument.

individuals ... the judicial branch may not exercise the legislative or executive power." Ala. Const. 1901, Art. III, § 42. Departing from the plain meaning of the text of a statute and substituting our own meaning would "turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers." DeKalb Cty. LP Gas Co., 729 So. 2d at 276.

1. The Competing Interpretations of § 9-11-30

Section 9-11-30, Ala. Code 1975, governs the licensing of game breeders in Alabama. Subsection (b)(1) provides:

> "Pursuant to the requirements and restrictions of subdivisions (2) and (3), the Commissioner of Conservation and Natural Resources shall issue an annual game breeder's license to any properly accredited person, firm, corporation, or association authorizing a game breeder to engage in the business of raising protected game birds, game animals, or fur-bearing animals, for propagating purposes in this state."

§ 9-11-30(b)(1), Ala. Code 1975. Both of the deer breeders hold game-breeder licenses under this provision, and they are therefore authorized to engage in the business of raising and selling protected game animals. They may also hunt protected game animals so long as doing so is consistent with other laws

and regulations. The statute provides the following definition for "protected game animals":

> "For the purposes of this section, Section 9-11-31, and Section 9-11-31.1, the term 'protected game animals and game birds' means any species of bird or animal designated by the Commissioner of Conservation and Natural Resources by regulation pursuant to Section 9-2-7, species of the family Cervidae documented by the department to exist in the wild in this state prior to May 1, 2006, which are whitetail deer, elk, and fallow deer, or species of nonindigenous animals lawfully brought into this state prior to May 1, 2006, and their offspring."

§ 9-11-30(a) (emphasis added). Section 9-11-503 prohibits the hunting of nonindigenous animals in Alabama, but not the hunting of "protected game animals." Thus, the deer breeders' right to raise, sell, and hunt their hybrid deer turns entirely on whether the hybrid deer are "protected game animals" as that term is defined in § 9-11-30(a).

The opposing sides' arguments address this interpretive riddle: to how much of § 9-11-30(a) does the concluding phrase "and their offspring" apply? The deer breeders argue that it modifies the entire provision, including "whitetail deer." Because, they argue, the deer breeders' hybrid deer are the offspring of whitetail deer, the hybrid deer are therefore "protected game animals." ADCNR argues that the phrase "and

their offspring" modifies only the immediately preceding phrase, "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006." Under ADCNR's interpretation, the hybrid deer would not be "protected game animals" for purposes of the deer breeders' motion for a judgment on the pleadings, and this case would be due to be remanded to the trial court for further proceedings.

The opposing arguments rely on two competing principles of statutory interpretation. Each comes with a technical-sounding name, which we use in this opinion to facilitate a nuanced explanation of the plain meaning of the statute. But make no mistake -- both of these principles simply restate basic rules of grammar that all English speakers intuitively understand. Like many rules of grammar, their proper application is sensitive to context. Our task here is to use our experience as English speakers to determine which rule makes the most sense in the context of § 9-11-30(a) and, by doing so, arrive at the plain and unambiguous meaning of the statute.

The deer breeders' interpretation relies on the series-qualifier principle: "When there is a straightforward,

parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 19, at 147 (Thomson/West 2012). The deer breeders argue that the postpositive modifier "and their offspring" applies to the entire preceding series of nouns, including "whitetail deer." Under this reading, the hybrid deer are protected game animals and the deer breeders would be entitled to a judgment on the pleadings.

ADCNR's reading relies on the rule of the last antecedent: "A pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent." Scalia & Garner, Reading Law § 18, at 144. ADCNR suggests that the pronoun "their" in the phrase "and their offspring" takes as its antecedent the nearest reasonable noun, which is the word "species" in the phrase "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006." Under this reading, the hybrid deer are not protected game animals and no party would be entitled to a judgment on the pleadings.

It has famously been observed that opposite canons of statutory interpretation can be marshaled in any disagreement over the meaning of a statute. See Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes Are to be Construed, 3 Vand. L. Rev. 395, 401 (1950). The parties here do just that. But a statute is not ambiguous unless competing principles of interpretation apply with roughly equal force, and that is not the case here. The series-qualifier principle advanced by the deer breeders is a poor fit compared to the rule of the last antecedent advanced by ADCNR. The trial court's conclusion that the modifier "and their offspring" applies to the term "whitetail deer" is therefore contrary to the plain meaning of the statute.

2. Selecting Between Interpretations

The United States Supreme Court was faced with a similar choice between the series-qualifier principle and the rule of the last antecedent in Lockhart v. United States, __ U.S. __, 136 S. Ct. 958 (2016). Both the majority opinion and the dissenting opinion in Lockhart offer guidance on how to determine which of those two principles most properly applies

in a given context. The majority opinion notes that the rule of the last antecedent is "particularly applicable where it takes more than a little mental energy to process the individual entries in [a] list, making it a heavy lift to carry the modifier across them all," while the series-qualifier principle is preferable when "the listed items are simple and parallel without unexpected internal modifiers or structure." __ U.S. at __, 136 S. Ct. at 963. The dissent adds that the series-qualifier principle has additional strength when "the modifier makes sense 'as much to the first and other words as to the last.'" Lockhart, __ U.S. at __, 136 S. Ct. at 971 (Kagan, J., dissenting) (quoting Paroline v. United States, 572 U.S. __, __, 134 S. Ct. 1710, 1721 (2014)). Both opinions in Lockhart acknowledge that the choice between the two principles depends in part on structural and contextual evidence in the text. See __ U.S. at __, __, 136 S. Ct. at 963, 969. These observations inform our conclusion that applying the rule of the last antecedent is the correct way to read § 9-11-30(a).

a. Applying the Series-Qualifier Principle to § 9-11-30(a) is Too Heavy a Lift

The length and complexity of the text of § 9-11-30(a) makes the series-qualifier principle a poor tool for determining the plain meaning of the statute. The deer breeders attempt to avoid this problem by quoting only small portions of the text at a time. For example, they summarize the statute this way:

> "In relevant part, § 9-11-30(a), Code of Alabama 1975 delineates certain animals as 'protected game animals.' These are, among others: 'whitetail deer, elk, and fallow deer, or species of nonindigenous animals lawfully brought into this state prior to May 1, 2006, and their offspring.'"

Deer breeders' brief at 10. But that summary quotes only about a third of the full provision at issue, and the quotation begins in the middle of a subordinate clause. Again, the full provision reads as follows:

> "For the purposes of this section, Section 9-11-31, and Section 9-11-31.1, the term 'protected game animals and game birds' means any species of bird or animal designated by the Commissioner of Conservation and Natural Resources by regulation pursuant to Section 9-2-7, species of the family Cervidae documented by the department to exist in the wild in this state prior to May 1, 2006, which are whitetail deer, elk, and fallow deer, or species of nonindigenous animals lawfully brought into this state prior to May 1, 2006, and their offspring."

§ 9-11-30(a), Ala. Code 1975. If the series-qualifier principle applies, it carries "and their offspring" not only back to "whitetail deer," but also all the way across the entire provision. To carry the modifier all the way back to "any species of bird or animal designated by the Commissioner" is, to echo the Lockhart majority, a heavy lift. To do so, the reader must exert a great deal of mental energy and scramble over a pile of internal modifiers and structure. The deer breeders' argument suggests that the most reasonable way to read this text is to carry the phrase "and their offspring" beyond the word "or," which sets off the final phrase in the provision, over a nonrestrictive clause listing the types of Cervidae native to Alabama, and over a citation to the source of the Commissioner's regulatory authority before finally reaching the first noun in the series. Under that reading, the pronoun "their" takes an antecedent over 60 words away. That is too much, and it weakens the force of the series-qualifier principle in interpreting this text.

We believe that the rule of the last antecedent more accurately explains how a typical English speaker would interpret § 9-11-30(a). Rather than understanding the word

"their" to take an antecedent as far as 60 words away, a typical English speaker faced with § 9-11-30(a) will intuitively understand that the word "their" in "and their offspring" takes the most conveniently placed antecedent, "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006." The meaning assigned a text by typical English speakers is, of course, the plain meaning. The trial court's conclusion that the definition of "protected game animals" includes the offspring of whitetail deer went beyond the plain meaning of the text and is therefore due to be reversed on that basis.

b. The Phrase "And Their Offspring" Makes Less Sense When Applied to Earlier Terms in the Series

Additionally, our conclusion that the rule of the last antecedent offers the most accurate reading is strengthened by the fact that the modifier "and their offspring" does not make as much sense when applied to other terms in the statute as it does when applied to the phrase "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006." The series-qualifier principle operates with the most strength when "the modifier makes sense 'as much to the first

and other words as to the last.'" Lockhart, __ U.S. at __, 136 S. Ct. at 971 (Kagan, J., dissenting) (quoting Paroline v. United States, 572 U.S. at __, 134 S. Ct. at 1721). That is not the case here, so preferring the series-qualifier principle to the rule of the last antecedent serves only to distract from the plain meaning of the statute.

Outside the breeding of unusual hybrids that the deer breeders seek to engage in, the phrase "and their offspring" does not seem to be a necessary part of the statute at all. Parents and their offspring almost invariably share a species, so the modifier "and their offspring" will rarely be of any practical relevance. Setting the term "and their offspring" to the side for a moment, § 9-11-30(a) contemplates three categories of species: first, "species ... designated by the Commissioner" by regulation; second, the three native "species of the family Cervidae," listed by name for clarity; and third, "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006." In virtually all cases, the offspring of any of these will share a species with its parents. The phrase "and their offspring" appears to only do substantial work in cases involving hybrids. Such cases are

particularly likely to arise in the third category, "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006," because those animals are kept in captivity and are subject to managed breeding by their importers. By contrast, it is difficult to imagine a scenario involving hybrids arising in the second category (native deer species) because those animals generally roam free alongside members of their own species and are unlikely to crossbreed and produce unusual offspring that are not of their same species. The modifier "and their offspring" is far less suited to that category than to the nonindigenous-species category. Given that dynamic, it does not make sense to apply the series-qualifier principle over the rule of the last antecedent.

Related provisions of the Alabama Code provide further evidence as to why the phrase "and their offspring" has special application to "species of nonindigenous animals." Section 9-11-31(b) creates an optional nonindigenous-game-breeder license that game breeders may purchase. The license permits eligible licensees to engage in the activities permitted under the general game-breeder license not only for

native game animals but also "for those nonindigenous animals which were lawfully in this state prior to May 1, 2006, or their offspring only." § 9-11-31(b), Ala. Code 1975. "Nonindigenous animals" and "their offspring" travel together in both §§ 9-11-30 and -31. The fact that § 9-11-30(a) includes a cross-reference to § 9-11-31 strengthens the inference that "offspring" are particularly relevant when dealing with nonindigenous animals, and less important with respect to other categories of protected game animals.

No matter how you look at it, the inclusion of the phrase "and their offspring" in § 9-11-30(a) is somewhat unusual. But it makes the most sense as a modifier for "species of nonindigenous animals," the phrase that is also nearest to it in the sentence. This suggests that the rule of the last antecedent should carry much more force than the series-qualifier principle and that the phrase "and their offspring" does not modify "whitetail deer."

c. The Deer Breeders' Comma-Based Argument

Finally, we address the deer breeders' argument that the "Oxford comma" (the comma before the final item in a list of three or more) before "and their offspring" necessitates a

reading that applies that modifier to every item in the series. The deer breeders are correct that punctuation has a bearing on statutory meaning -- but it is merely one indicator of meaning among many, and, like any rule of interpretation, its strength varies with context. See 2A Norman J. Singer & Shambie Singer, Sutherland Statutes and Statutory Construction § 47:15 (7th ed. 2019). A comma may be decisive in some cases, but not here.

It is not clear that the comma in question is even an Oxford comma at all, and we give it very little weight in our interpretation. As a matter of style, dates should always include a comma after the year when they appear in the middle of a sentence. Bryan A. Garner, The Redbook: A Manual on Legal Style § 1.10, at 10 (2d ed. 2006) ("In a full date that is written month-day-year," "place a comma after the year if the sentence continues."). This Court follows that convention in its opinions, and so does the Alabama Code. Consider § 9-11-30(b)(4), Ala. Code 1975: "A game breeder's license shall expire on September 30 of the year in which issued, unless renewed, except that any license issued pursuant to this section between May 1, 2006, and September 30, 2006, shall

expire on September 30, 2006." The commas following "May 1, 2006" and "September 30, 2006" are included because they correctly punctuate the dates, not because they have any bearing on the structure and meaning of the sentence. The comma following the date in the "protected game animals" definition is best read as this kind of comma, not as an Oxford comma. The deer breeders' argument about the placement of the comma before "and their offspring" does not defeat the plain meaning of the statute as explained above.[2]

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[2]ADCNR points out that it was the Code Commissioner, not the legislature, who inserted the comma in question along with the effective date of the statute. Compare Act No. 2006-109, Ala. Acts 2006, with § 9-11-30(a), Ala. Code 1975. But the session law is not the text that matters. Although the text of a session law might be useful for determining the plain meaning of a federal statute, session laws have no bearing on the meaning of unambiguous statutes passed by the Alabama Legislature. That is because in Alabama, unlike in the federal system, the legislature passes a separate act each term adopting the codified text of previous enactments. See, e.g., Act No. 2007-147, Ala. Acts 2007.

> "Once the Code Commission modifies an act and the Legislature thereafter adopts a Code containing the modification, the modification has the force of law.
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> > "'It is the settled law of this state that the Code of Alabama ... is not a mere compilation of the laws previously existing, but is a body of laws, duly enacted, so that laws, which previously existed, ceased to be law when omitted from [the] Code, and additions, which appear

3. The Phrase "And Their Offspring" Does Not Modify "Whitetail Deer"

Applying the modifier "and their offspring" to the term "whitetail deer" in § 9-11-30(a) is contrary to the plain meaning of the statute, because doing so involves applying an interpretive principle in a context where another principle is clearly more reasonable. The trial court thus erred when it entered a judgment on the pleadings for the deer breeders on the ground that the hybrid deer are the offspring of whitetail deer and therefore protected game animals. There may well be other grounds for finding that the hybrid deer are "protected game animals" under the statute -- for example, because they are considered to be whitetail deer as a matter of scientific fact, or because they are covered by the language "species of nonindigenous animals lawfully brought into this state prior to May 1, 2006, and their offspring." We express no opinion on those arguments. But any route to a definitive conclusion that the deer breeders' hybrid deer are or are not "protected

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> therein, become the law from the approval of the Act adopting the Code.'
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> "State v. Towery, 143 Ala. 48, 49, 39 So. 309, 309 (1905)."

Swift v. Gregory, 786 So. 2d 1097, 1100 (Ala. 2000).

game animals" requires additional facts -- the question is not appropriate for resolution on a motion for a judgment on the pleadings.

B. Partus Sequitur Ventrem

As an alternative ground for its order, the trial court cited an old doctrine called partus sequitur ventrem, which means "the offspring follows the condition of the mother." Black's Law Dictionary 1995 (11th ed. 2019). We will refer to the doctrine as the partus rule, for short. This Court last cited the partus rule by name in 1890, see Dyer v. State, 88 Ala. 225, 7 So. 267 (1890), though some of our later cases cite partus-based decisions for particular points of law related to liens on livestock. See, e.g., McCarver v. Griffin, 194 Ala. 634, 69 So. 920 (1925) (citing Dyer, supra, Meyer Bros. v. Cook, 85 Ala. 417, 5 So. 147 (1888), and Gans v. Williams, 62 Ala. 41 (1878)). The mere fact that a rule is old is not a reason to disregard it, but the partus rule's age and disuse (and its dubious provenance) weigh against the novel extension of the rule urged by the deer breeders. The partus rule has historically applied in two limited contexts -- evaluating ownership interests in livestock (and slaves)

and determining the legal status of persons. This case does not fall within either of those categories, and it is therefore unclear why the partus rule should have any application. We decline to adopt the trial court's extension of the partus rule.

First, the partus rule has been used to determine ownership interests in animate property. The deer breeders rely on cases dealing with ownership interests in livestock, but in Alabama the doctrine was perhaps more commonly used in the context of chattel slavery. See, e.g., Bryan v. Weems, 29 Ala. 423, 429 (1856). In the context of property, the partus rule meant that anyone with a property right in animate property had the same property right in any offspring of that animate property. See Lee v. Lee, 77 Ala. 412, 420 (1884) ("So, we have held, that the natural increase of domestic animals, property of the wife's statutory estate, is itself her statutory separate estate -- applying the maxim, partus sequitur ventrem."). That principle is of no help in this case, because the ownership of the hybrid deer is not in question. The parties do not dispute that the hybrid deer are wild animals and that title to them is therefore with the

State of Alabama. § 9-11-230, Ala. Code 1975. The cases applying the partus rule in this way are inapposite.

Second, the partus rule was used to determine the legal status of persons -- for example, free or slave; Indian or non-Indian. Application of the partus rule to humans is ugly and fortunately appears to have fallen away. The use of the rule to determine a person's status is exemplified in this Court's opinion in Bell v. Chambers, 38 Ala. 660, 665 (1863) ("Under the well established legal maxim, 'partus sequitur ventrem,' a person may be a slave, and yet so far removed from the African stock, as to leave no trace of its blood or color. On the other hand, it is well settled, that color raises the presumption of status."). The partus rule was applied similarly by the United States Supreme Court in Alberty v. United States, a case relied on by the deer breeders. 162 U.S. 499, 501 (1896) ("Duncan, the deceased, was the illegitimate child of a Choctaw Indian, by a colored woman, who was not his wife, but a slave in the Cherokee Nation. As his mother was a negro slave, under the rule, 'Partus sequitur ventrem,' he must be treated as a negro by birth, and not as a Choctaw Indian. There is an additional reason for this in

the fact that he was an illegitimate child, and took the status of his mother."). Thankfully, the law of personal status is no longer central to American law. In fact, it is doubtful that this application of the partus rule has any continuing legal force. But even if it did, and even if it made sense to speak of an animal's "status" in the 19th-century sense (i.e., as determinative of the status-bearer's legal rights), "whitetail deer" is a biological classification, not a legal status that can be inherited from a mother under the partus rule. Alberty and other cases featuring status-based applications of the partus rule are inapposite.

To the extent the doctrine of partus sequitur ventrem retains any modern validity, it does not mean that a hybrid deer is considered to be a whitetail deer in the eyes of the law solely because it was born of a whitetail deer mother. The trial court's reliance on partus sequitur ventrem was misplaced.

Conclusion

We do not decide today whether the deer breeders' hybrid deer are "protected game animals" or not. We cannot answer

that question based solely on the parties' pleadings, and we are limited to the pleadings as we review the trial court's disposition of the parties' cross-motions for a judgment on the pleadings. But the plain meaning of § 9-11-30(a) makes it clear the hybrid deer are not "protected game animals" based solely on the fact that they are the offspring of whitetail deer -- the term "and their offspring" in the statutory definition does not modify "whitetail deer." If the hybrid deer are "protected game animals" based on another theory, it will be established only following further proceedings. Nor does the partus rule, cited by the trial court as an alternative ground for its decision, establish that the hybrid deer are "protected game animals" like their whitetail deer mothers -- the rule has no application in this case. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Stewart, J., concur.

Bolin, Shaw, Wise, Bryan, and Mendheim, JJ., concur in the result.

Sellers, J., dissents.