IN THE COURT OF APPEALS OF IOWA

No. 0-119 / 89-65

FILED
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CLERK SUPREME COURT

RALPH NEWMAN,

Appellee,

vs.

LEO WEBER, DANIEL WEBER, DOUG WEBER, and HOWARD WEBER,

Appellants.

Appeal from the Iowa District Court for Wapello County, Richard J. Vogel, Judge.

Defendants appeal the district court award to plaintiff. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for defendants-appellants.

Allan C. Orsborn of Keith, Orsborn, Bauerle & Milani, Ottumwa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

OXBERGER, C.J.

Plaintiff Ralph Newman owns a farm which abuts the same county road in Wapello County as a farm owned by defendants Leo Weber and Daniel Weber. Defendants Doug Weber and Howard Weber are employed by Leo and Daniel. Newman began to raise sweet corn commercially in 1982. The Webers have raised cattle and hogs on their land for many years. They haul hog manure on the county road past Newman's farm. Newman brought this nuisance suit alleging that dust from the gravel roadway became impregnated with hog manure, and then blew onto his sweet corn crop, rendering it unmarketable in 1984 and 1986. After a bench trial, the district court awarded Newman $46,093.50. This judgment was against Leo and Daniel only, as owners of the hog operation. The Webers appeal.

Newman was previously involved in a workers' compensation suit, Newman v. John Deere Ottumwa Works, 372 N.W.2d 199 (Iowa 1985). In that case the court denied benefits on the ground Newman had only imagined physical trauma. Id. at 203. The court noted Newman had a history of mental illness and he had developed a single-minded preoccupation with fresh air and an aversion to smells. Id. at 201-02. The Webers sought to introduce Newman and the related district court decision into evidence to impeach Newman's claims that his sweet corn smelled of hog manure. The district court sustained Newman's objection to

the exhibits. The Webers contend the court abused its discretion in refusing to admit relevant evidence.

Less than thirty days before the beginning of trial the Webers identified two expert witnesses. The Webers were involved in a dispute with their insurance company concerning defense of this suit. They state they did not know any earlier that they would be responsible for their own defense. The court did not allow the experts to testify. The Webers made an offer of proof to the effect that both experts would testify manure does not blow in the wind and the gas causing the smell dissipates within ten days. They claim the court abused its discretion in imposing the extreme sanction of not allowing their experts to testify.

The Webers argue lack of substantial evidence that they maintained a nuisance. Even if substantial evidence exists, their actions do not constitute a nuisance as a matter of law. They assert that Newman's claims of tons of manure on the roadway were simply fallacious. The Webers point out Newman made numerous complaints to the Department of Natural Resources (DNR) during the period in question, and he never mentioned hog manure on the county road. Furthermore, they state since their feed lot is in compliance with Iowa Code chapter 172D, it may not be considered a nuisance.

Finally, the Webers contend the award of damages was not supported by substantial evidence. They feel Newman failed to show the sweet corn was rendered permanently unmarketable since at most the sweet corn would have an odor for ten days. They also feel Newman did not take any steps to mitigate his damages; he did not offer all of the allegedly unmarketable corn for sale.

Our review in this case is limited to errors of law. Iowa R. App. P. 4. As this case was tried to the district court sitting without a jury, its findings of facts have the effect of a special verdict. Id. We are bound by the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

The Webers first object to the trial court's refusal to admit Newman v. John Deere Ottumwa Works into evidence. Initially, we note the admission of evidence is within the sound discretion of the trial court and we will interfere only upon a showing of clear abuse of discretion. Henkel v. R. & S. Bottling Co., 323 N.W.2d 185, 193 (Iowa 1982).

Appellants fail to make that showing here. By the time of this present case, Newman v. John Deere had been before the courts for almost ten years. The determination of whether evidence is too remote in time is within the discretion of the trial court. Harrison v. Ulicki, 193 N.W.2d 533, 536 (Iowa 1972). The trial court certainly was within its discretion in refusing to admit the cases into evidence.

Additionally, even if those cases may have tended to impeach Newman's credibility and sense of smell, the evidence presented by the plaintiff's other witnesses appears strong enough to justify the verdict. The produce middleman, Norman Crow, testified grocers had refused delivery of the sweet corn because of the strong hog manure odor. The trial court found Crow very credible. The trial court's assessment of the credibility of witnesses is given considerable weight on appeal. Vawter v. McKissick, 159 N.W.2d 538, 540 (Iowa 1968). Other witnesses testified to the large amount of hog manure on the road and its effect on their vehicles. Even if there was error in refusing to admit Newman v. John Deere into evidence, it was harmless. The decision of the trial court will not be reversed where error, if any, is harmless. The Telegraph Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 535-36 (Iowa 1980).

The Webers next claim the trial court abused its discretion in refusing to allow defendants' two expert witnesses to testify. The rules of procedure clearly state:

> If a party expects to call an expert witness when the identity or the subject of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the information described...as soon as practicable, but in no event less than thirty days prior to the beginning of trial except by leave of court."

Iowa R. Civ. P. 125(c) (emphasis added).

Here, the same attorney had been representing the same defendants for almost two and one-half years. He had conducted discovery and obtained continuances of trial. Only three days prior to the scheduled commencement of the long delayed trial, defendant attempted to introduce two new expert witnesses. The trial court was clearly within its discretion in refusing to allow the new expert witnesses to testify. See Kilker, by and through Kilker v. Mulry, 437 N.W.2d 1, 3-6 (Iowa App. 1988). The fact that there was a question as to whether defendants' insurance carrier was to defend the suit does not excuse defendants' failure to comply with the rules.

> The subjective explanation for the default [failure to comply with procedural rules on discovery of expert witnesses] is irrelevant. It makes no difference whether it was due to failure to prepare for trial or to an intentional purpose to gain the benefit of surprise. The rule bars the result without regard to cause, except for those beyond control.

White v. Citizens National Bank of Boone, 262 N.W.2d 812, 816-17 (Iowa 1978).

More than two years had elapsed since the service of the interrogatories in this case. Defendants had plenty of time to prepare their case. They cannot be now heard to say the trial court was unfair in failing to excuse their tardiness after so long a wait. Besides, one of their expert witness apparently did testify to essentially the same facts as the two disallowed experts would have.

Next, the Webers claim the trial court's findings of fact were not supported by substantial evidence. We find there is ample evidence in the record to support the trial court's findings. Additionally, the ruling of the trial court appears to be thoughtful and well reasoned.

We are bound by the trial court's findings of fact if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We review the evidence in the light most favorable to the findings of fact of the trial court. Brichacek v. Hiskey, 401 N.W.2d 44, 45-46 (Iowa 1987). Factual disputes depending heavily on credibility of witnesses, as here, are best resolved by the trial court. Capitol Savings and Loan Association v. First Financial Savings and Loan Association, 364 N.W.2d 267, 271 (Iowa App. 1984). The trial court obviously considered all the evidence and carefully evaluated the witnesses. We find substantial evidence to support the trial court's findings of facts.

The Webers claim their hog operation and its attendant circumstances cannot constitute a nuisance as a matter of law.

> In any nuisance action or proceeding against a feedlot brought by or on behalf of a person whose date of ownership or realty is subsequent to the date of operation of that feedlot, proof of compliance with sections 172D.3 and 172D.4 shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either section 172D.3 or 172D.4.

Iowa Code § 172D.2 (1989).

The Webers seem to think they can do anything in connection with their hog lot and still come under the umbrella of section 172D.2. However, in this case the complaint concerns the spilling of manure on a public roadway and not the hog feedlot itself.

Recently, the Iowa Supreme Court held the spreading of hog manure in close proximity to a residential neighborhood could constitute a nuisance. Valasek v. Baer, 401 N.W.2d 33 (Iowa 1987). Although the supreme court did not directly address the question of the applicability of section 172D.2 and the farmer in that case did not have priority of location, the clear implication is the protection of the statute does not extend to ancillary operations outside the feedlot. Additionally, the regulation itself demands that to come under its protection, the activity in question must be regulated in the prescribed manner. The Webers have pointed out no regulation stating the Department of Natural Resources regulates the amount of manure that can be spilled on a public roadway with impunity. We determine section 172D.2 does not apply in this case.

Additionally, it appears the section 172D.2 affirmative defense was not raised until posttrial motion. Affirmative defenses are required to be set out in the responsive pleadings. Iowa R. Civ. P. 72, 104. Failure to do so precludes review of that issue on appeal. Foods, Inc. v.

Leffler, 240 N.W.2d 914, 920 (Iowa 1976). However, even if the issue was properly preserved, we find the case does not come within the purview of section 172D.2.

Finally, the Webers contend the award of damages was without substantial basis. They state in their brief Newman never delivered any of the sweet corn in question to any grocers or had it rejected. That assertion is directly contrary both to the evidence and to the trial court's finding of facts. Norman Crow stated the first batch of corn he delivered in 1984 he had to give the grocers credit for, and the second batch was refused. The reason the grocers gave was the strong smell of hog manure in the corn.

Both Newman and his buyer-middleman, Norman Crow, testified at length about the price of corn, how many dozen ears went in a crate or sack, and the price of sweet corn during the relevant time periods. Newman also testified concerning the number of acres that were contaminated, the cost of harvesting them, and the approximate dollar loss per acre.

We are bound by the trial court's finding of facts if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The award of damages will be upheld if the record discloses a reasonable basis from which the amount of damages can be inferred or approximated. Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 403

(Iowa 1982). The record shows Newman knew the number of acres affected, the price of sweet corn in the years in question, the approximate harvest per acre, and the cost of harvest per acre. His testimony is substantiated by Norman Crow, whom the trial court found very credible. We affirm the trial court on the issue of damages.

We affirm the ruling of the trial court in all respects.

Costs of this appeal are assessed to the appellants.

AFFIRMED.

Habhab, J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent.

The majority has me confused. In one part of its decision, it states:

> Factual disputes depending heavily on credibility of witnesses, as here, are best resolved by the trial court. [Citation.] The trial court obviously considered all the evidence and carefully evaluated the witnesses.

Supra at 7. Prior to that, the majority states:

> Even if there was error in refusing to admit Newman v. John Deere into evidence, it was harmless. The decision of the trial court will not be reversed where error, if any, is harmless.

Supra at 5 (citation omitted).

It seems to me that we cannot have it both ways. The bare statement "it was harmless", without demonstrating in what way it was harmless, leaves us with the position that it is harmless because, and only because, we say so. That is an abuse of our power as an appellate court.

In order for error to be harmless, if that is possible, it can only be because the elimination of that error would not have caused a different outcome in the case. I do not believe we are in a position to judge whether revealing to the fact-finder the plaintiff's history of a propensity to exaggerate in matters of smells would not change the result. The evidence of the plaintiff was extremely important. The exclusion of evidence pertaining to his credibility, in my opinion, was not harmless.

I would reverse and remand for a new trial.