IN THE COURT OF APPEALS OF IOWA

No. 8-626 / 97-1900

ELLIS GLEN HIRST and DUANE NEILL,

Plaintiffs-Appellees,

vs.

CONTROL SERVICES, INC.,
An Iowa Corporation,

Defendant-Appellant.

FILED
JAN 27 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Harrison County, J.C. Irvin, Judge.

Defendant appeals from a district court ruling denying its motion for new trial or judgment notwithstanding the verdict following a verdict for plaintiffs in their action for trespass and damage to trees. **AFFIRMED.**

Richard W. Ratz of Gast, Ratz & Gutierrez, P.C., Omaha, Nebraska, and Donald G. Furlow of Brodkey, Cuddigan & Peebles, Omaha, Nebraska, for appellant.

Robert V. Rodenburg, Council Bluffs, for appellees.

Heard by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ. Zimmer, J., takes no part.

MAHAN, J.

Control Services, Inc. appeals from a district court ruling denying its motion for new trial or judgment notwithstanding the verdict following a verdict for Ellis Hirst and Duane Neill in their action for trespass and damage to trees. We affirm.

Hirst and Neill own property in Harrison County. The Harrison County Board of Supervisors and its drainage engineer, Steve Sunquist, had devised a brush control program to address problem areas in various drainage districts in Harrison County. Control Services was hired to carry out the program, which included killing trees, in specified areas. Hirst's property and Neill's property are located in the area Control Services treated in 1991.

After the 1991 treatment, Hirst contacted Sunquist about trees damaged on his property and learned Control Services may have been involved. Hirst determined he had lost thirty-two trees; Neill numbered his loss at twenty-eight. After contact with Control Services, Hirst and Neill filed this trespass action.

Testimony was presented that replacement costs would be roughly $75 to $80 per tree plus fifty percent of the purchase price to have the tree planted. Hirst's two bids to clean up his property, showing costs in excess of $40,000, were admitted into evidence. Hirst testified he valued his trees as a windbreak, a wildlife habitat, and for shade. Neill testified he valued his trees for shade and privacy, and as a windbreak and wildlife habitat.

Control Service's motions for a dismissal following the close of plaintiffs' case and a directed verdict were overruled. The jury returned a verdict in favor of Hirst

and Neill. Hirst was awarded $75,000 in damages; Neill was awarded $37,500. Control Services then made motions for a judgment notwithstanding the verdict and a new trial, which were also overruled.

I. MOTION TO ENLARGE THE RECORD. On the day before oral argument before this court, plaintiffs filed a motion to enlarge the record with newly-discovered evidence. After review, we overrule and deny this motion.

II. COUNSEL'S MENTION OF INSURANCE. Plaintiffs called Jeff Wallis as a witness at the trial. Wallis, who performs tree work, was asked if he was insured and he responded in the affirmative. Control Services made motions for mistrial and new trial based on the mention of insurance by plaintiffs' counsel while examining Wallis.

We review the district court's denial of these motions under an abuse of discretion standard. *Stover v. Lakeland Square Owners Ass'n*, 434 N.W.2d 866, 873 (Iowa 1989). Our question is whether the trial court clearly abused its discretion, that is, whether prejudice resulted from counsel's mention of insurance or whether a different result could have been probable but for the mention of insurance. *Id.* at 873-874. We give extremely broad, though not unlimited, discretion to the district court on motions for mistrial and new trial because we recognize the district court is in a better position to appraise the situation in the context of the trial. *Id.* at 874.

In order to prevail on appeal, Control Services must show it was prejudiced by the reference to insurance. *Carter v. Wiese Corp.*, 360 N.W.2d 122, 130 (Iowa App. 1984). Although we recognize it is generally improper for the subject of liability

insurance to be raised before the jury, we do not presume prejudice from every mention of insurance at trial. *Stover*, 434 N.W.2d at 874.

Control Services immediately brought the contention that the mention of insurance was prejudicial to the district court's attention and was overruled by the district court twice. Control Services speculates that since Wallis's business and Control Services' business are similar, the jury would conclude Control Services has insurance because Wallis is insured. This is insufficient to show prejudice warranting the grant of a mistrial or a new trial. *See Campbell v. Van Roekel*, 347 N.W.2d 406, 411-412 (Iowa 1984). Therefore, we find the district court was within its discretion in overruling Control Services' motions for mistrial and a new trial.

III. MOTIONS FOR JUDGMENT AS A MATTER OF LAW. When reviewing the denial of a motion for directed verdict, we apply the same principles as the trial court. *Pearson v. Ossian*, 420 N.W.2d 493, 495 (Iowa App. 1988). The question is whether the evidence, when viewed in the light most favorable to the nonmovant, was sufficient to generate a jury question. *Holdsworth v. Nissly*, 520 N.W.2d 332, 336 (Iowa App. 1994). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. *Graves v. O'Hara*, 576 N.W.2d 625, 628 (Iowa App. 1998). The same rule applies to a motion for judgment notwithstanding the verdict. *See Hughes v. Massey-Ferguson, Inc.*, 490 N.W.2d 75, 78 (Iowa App. 1992); Iowa R. Civ. P. 243(b).

The elements of plaintiffs' trespass claim are: (1) Control Services went on Hirst's and Neill's property; (2) Hirst and Neill did not give permission for Control

Services to do so; (3) Control Services caused damage while on Hirst's and Neill's property; and (4) the amount of damages. *See Iowa State Highway Comm'n v. Hipp*, 259 Iowa 1082, 1089, 147 N.W.2d 195, 199 (1966); *New York Life Ins. Co. v. Clay County*, 221 Iowa 966, 971, 267 N.W. 79, 81 (1936).

The first three elements were uncontested at trial. Control Services' president Herbert Hoover admitted Control Services' employees entered the Hirst and Neill properties, without permission from Hirst or Neill, and caused damage to trees on the properties.

Hirst and Neill each testified to the value of their trees; two bids for clean up costs were admitted into evidence; and a nursery employee testified to the cost of replacement trees. This is substantial evidence to support the damages element of Hirst's and Neill's claim. We find the district court correctly overruled Control Services' motion to dismiss at the close of plaintiffs' case, motion for directed verdict, and motion for judgment notwithstanding the verdict.

IV. MOTION FOR NEW TRIAL. We review the district court's action on a motion for new trial for abuse of discretion. *Foggia v. Des Moines Bowl-O-Mat, Inc.*, 543 N.W.2d 889, 891 (Iowa 1996). A motion for a new trial may be granted where the jury awards excessive or inadequate damages appearing to have been influenced by passion or prejudice, or where the verdict is not sustained by sufficient evidence, or are contrary to law. Iowa R. Civ. P. 244(d) and (f). Where the verdict is within a reasonable range as indicated by the evidence, the courts should not

interfere with what is primarily a jury question. *Neumann v. Service Parts Headquarters*, 572 N.W.2d 175,177 (Iowa App. 1997).

There is no "simple, all-purpose measure of recovery for loss of trees." *Bangert v. Osceola County*, 456 N.W.2d 183, 189 (Iowa 1990) (quoting *Laube v. Estate of Thomas*, 376 N.W.2d 108, 109 (Iowa 1985)). Three alternative measures of recovery are the commercial value of the trees, replacement cost, or the difference of the real estate's value before and after the loss of the trees. *Bangert*, 456 N.W.2d at 189.

The jury verdict in the case at bar also included the theory of intrinsic value. Damages for the intrinsic value of lost trees may be awarded when the trees were maintained for special purposes other than for commercial value, including aesthetic value, sentimental and historic reasons, shade and windbreaks, or environmental, wildlife, and special landmark purposes. *Id.* at 190.

> In fixing the appropriate measure of recovery, it is incumbent upon the court to keep in mind "that the principle underlying allowance of damages is that of compensation, the ultimate purpose being to place the injured party in as favorable a position as though no wrong had been committed." *Dealers Hobby, Inc. v. Marie Ann Linn Reality Co.*, 255 N.W.2d 131, 134 (Iowa 1977). While it may be hard to ascertain such a loss with preciseness and certainty, the wronged parties should not be penalized because of that difficulty. Difficulty in ascertaining the amount of damages does not alone constitute a reason for denying recovery or for substituting an inappropriate method.

Id.

The jurors were instructed on intrinsic value in Jury Instruction No. 13, part 1. After review of the record, we find the jury verdict is within a reasonable range as

indicated by the evidence. We have considered Control Services' other grounds for a new trial and find they are also without merit.

V. JURY INSTRUCTIONS. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *Manno v. McIntosh*, 519 N.W.2d 815, 823 (Iowa App. 1994). Submission of issues that have no support in the evidence to the jury is error, as is the failure to submit issues that are supported by substantial evidence. *Id.* We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law.

After review of the record, we find the jury instructions, when considered as a whole, conveyed the applicable law and did not mislead the jury.

For these reasons, we affirm the jury verdict.

AFFIRMED.

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Id.

The jurors were instructed on intrinsic value in Jury Instruction No. 13, part 1. After review of the record, we find the jury verdict is within a reasonable range as indicated by the evidence.

V. STATUTORY IMMUNITY. Finally, Control Services argues it was entitled to judgment notwithstanding the verdict or a new trial based on the theory of statutory immunity. We disagree. Specifically, Control Services contends it had statutory authority to perform the brush control program on plaintiffs' land and it performed the requested work on the designated drainage ditches "within the bounds of its agreement with the county drainage engineer" and thus is statutorily immune from the claim of plaintiffs.

The district court found, and we agree, there was sufficient evidence presented at trial to establish (1) plaintiffs' land was not part of any drainage district over which the Harrison County Board of Supervisors had control, ownership, or authority; (2) the Harrison County Board of Supervisors had no easements or rights-of-way on the properties in question; (3) the Harrison County Board of Supervisors specifically indicated they did not want entry made upon plaintiffs' property; and (4) Control Services' president, Herbert Hoover, was specifically instructed not to enter said land.

We conclude Control Services did not have any authority to enter plaintiffs' land under a theory of statutory immunity.

VI. JURY INSTRUCTIONS. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. *Manno v. McIntosh*, 519 N.W.2d 815, 823 (Iowa App. 1994). Submission of issues

that have no support in the evidence to the jury is error, as is the failure to submit issues that are supported by substantial evidence. *Id.* We must reverse and order a new trial if the instructions as a whole are insufficient to convey the applicable law.

After review of the record, we find the jury instructions, when considered as a whole, conveyed the applicable law and did not mislead the jury.

For these reasons, we affirm the jury verdict.

AFFIRMED.