

IN THE COURT OF APPEALS OF IOWA

FILED

APR - 8 1983

CLERK SUPREME COURT

BUMAN FARMS, INC.,)

Plaintiff-Appellee,)

vs.)

Filed April 8, 1983

BONANZA BUILDINGS, INC.,)

Defendant-Appellant,)

and)

STOCKADE STRUCTURES t/d/a COOK)

2-451

2-68141

CONSTRUCTION COMPANY; and)

DIANNE COOK d/b/a STOCKADE)

STRUCTURES t/d/a COOK)

CONSTRUCTION COMPANY,)

Defendants.)

Appeal from Shelby District Court - Keith E. Burgett, Judge.

Defendant appeals judgment for plaintiff challenging: 1) the instructions which gave the jury criteria for imposing vicarious liability on the defendant for the acts of the co-defendant; 2) exclusion of expert testimony; 3) the refusal to order plaintiffs to produce income tax returns, allegedly relevant to plaintiffs' claim of lost income; and 4) sufficiency of the evidence. **AFFIRMED.**

David F. McCann, Council Bluffs, Iowa; Howard R. Barron, Laura A. Kaster and Paul A. Rogers, of Chicago, Illinois, for defendant-appellant Bonanza.

J. C. Salvo and Richard C. Schenck of Hines, Lewis, Salvo, Deren & Schenck, Harlan, Iowa, for plaintiff-appellee.

Considered en banc.

PER CURIAM

The plaintiff, Buman Farms, Inc., won a judgment in this lawsuit alleging negligence and breach of warranties resulting from the collapse of a farm building in a windstorm. The defendant, Bonanza Building, Inc., which manufactured the prefabricated parts of the building, has appealed. The defendant challenges: 1) the instructions which gave the jury criteria for imposing vicarious liability on it for the acts of the defendant, Cook Construction Co., which erected the building; 2) the court's exclusion of alleged expert meteorological testimony by an officer of the defendant; and 3) the court's refusal to order the plaintiff to produce income tax returns allegedly relevant to its claim of lost income. The defendant also contends that plaintiff failed to meet its burden of proof on several elements of its cause of action. We affirm.

In 1974 Donald Buman, president of plaintiff Buman Farms, Inc., contracted with Cook Construction Company for the construction of a cattle confinement building on the Buman farm. Cook erected a prefabricated "Bonanza Building" whose component parts were manufactured by the defendant Bonanza Buildings, Inc., and shipped to Cook.

In June 1979 part of the building collapsed during a storm. Plaintiff later filed this lawsuit alleging negligent design and construction of the building and breach of express and implied warranties. At an early stage of the proceedings the Cook defendants (Cook Construction and a successor enterprise to Cook Construction) defaulted, leaving Bonanza Buildings as the only active defendant.

A jury returned a verdict awarding the plaintiff over \$62,000 for damage to the building and over \$34,000 for consequential damages. Defendant appeals from the resulting judgment.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4.

II. Sufficiency of the Evidence. Defendant contends that the trial court erred in overruling its motions for a directed verdict, judgment notwithstanding the verdict, and new trial based upon the insufficiency of plaintiff's evidence concerning proximate cause, standard of care and damages. The principles governing our consideration of the denial of a judgment n.o.v. were stated in Meeker v. City of Clinton, 259 N.W.2d 822 (Iowa 1977).

In determining whether a jury question was engendered when a party seeks a directed verdict, dismissal or judgment notwithstanding the verdict, the trial court views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted and every legitimate inference which may be reasonably deducted therefrom must be carried to the aid of the evidence and if reasonable minds can differ on the issue it is for the jury. [citation omitted]

Our function is to review the evidence to determine, not whether it proves defendant's negligence, but whether it is sufficient so the trial court was justified in submitting the question to the jury as the trier of facts. [citation omitted]

In determining this issue this court views the evidence in accordance with the same principles required for review by the trial court. [citation omitted]

Id. at 828. See also Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 907-08 (Iowa Ct. App. 1982).

Relating to defendant's motion for new trial, the trial court has broad discretion to determine whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). "Only when the evidence clearly shows that the trial court abused its discretion will we interfere." In re Marriage of Johnson, 311 N.W.2d 697, 698 (Iowa 1981). With these principles in mind, we review the present case.

A. Proximate Cause. Defendant contends plaintiff failed to submit any evidence to establish that any negligent act or breach of warranty by defendant as opposed to catastrophic winds, was the proximate cause of plaintiff's building's collapse. We disagree.

Generally, questions of negligence, contributory negligence and proximate causes are for the jury; it is only in exceptional cases that they may be decided as matters of law. Iowa R. App. P. (f)(10). "In order to recover, the plaintiff must prove the defendant's negligence was a proximate cause of his damages. The plaintiff thus bears the risk of nonpersuasion on establishing the defendant's negligence as a substantial factor in causing his damages." Adam v. T.I.P. Rural Electric Cooperative, 271 N.W.2d 896, 902 (Iowa 1978). The court approvingly cited Restatement (Second) of Torts § 431 in Speed v. State, 240 N.W.2d 901, 905 (Iowa 1976).

In many cases the question before the court is whether the actor's negligence was in fact the cause of the other's harm—that is, whether it had any effect in producing it—or whether it was the result of some other cause, the testimony making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. In such a case, the question, whether the defendant's negligence has a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm, does not arise if the testimony clearly proves that the harm is from a cause other than the actor's negligence. Indeed, the testimony often makes it clear that if the defendant's conduct had any effect, the effect was substantial. It is only where the evidence permits a reasonable finding that the defendant's conduct had some effect that the question whether the effect was substantial rather than negligible becomes important.

Restatement (Second) of Torts § 431, comment b. See also Montgomery Properties v. Economy Forms, 305 N.W.2d 470, 477 (Iowa 1981). "...[S]ubstantial' is commented upon as being 'used to denote the fact that the defendant's conduct has such an effect in producing harm as to lead reasonable men to regard it as a cause.' " Id. (quoting Restatement (Second) of Torts § 431, comment a).

Plaintiff pled that defendant "negligently designed and constructed the cattle confinement facility in that said facility was, inter alia, structurally weak and lacked proper bracing, supports, and anchoring," and that such defects were the proximate cause of plaintiff's damages. Plaintiff produced evidence that the structure had little wind resistance. Plaintiff's expert testified that plaintiff's

building had a wind load capacity of 5-1/2 to 7 pounds per square foot (able to resist winds of 40 to 46 miles per hour), but that it should have had a wind load capacity of 15 to 20 pounds per square foot (able to resist winds of 78 miles per hour). Plaintiff's expert also testified that the structure could have been strengthened by imbedding columns in the ground, eliminating a bolt connection to the foundation on the south wall, using larger columns and connecting the columns to the trusses with knee braces. We believe plaintiff produced sufficient evidence that defendant's negligence was the proximate cause of plaintiff's injuries to warrant the submission of the issue to the jury.

B. Standard of Care. Defendant also argues that plaintiff failed to submit evidence to establish the standard of care applicable to defendant. We disagree.

Where a party produces no evidence of any standard of care, it would be error to allow the matter to be submitted to the jury. (emphasis added) See Dickinson v. Maillard, 175 N.W.2d 588, 597 (Iowa 1970). Such is not the case before us. Plaintiff's expert was questioned concerning recognized standards and codes applicable to the building and construction industry. Plaintiff's expert referred to the contents of the Uniform Building Code, the design guidelines published by The American Institute of Timber Construction and The American Institute of Steel Construction, and publications by the Frame Builders Association and Midwest Planning Service. He testified that as an engineer these standards should be considered in designing a structure. Based upon his observations of the damage to plaintiff's building and relevant documents, the expert expressed the opinion "that the building was insufficiently designed and constructed to withstand the forces that I as an engineer utilizing my judgment would expect that it should withstand." Appendix at 139.

Defendant complains that these codes and guidelines were not enforceable in Shelby County, Iowa, where plaintiff's building was located, and should not be

considered in determining the standard of care. Despite this complaint, plaintiff's expert did, however, testify that such codes and standards would be applicable even to Shelby County. From this record, we find there was sufficient evidence produced on the issue of the standard of care required by defendant and refuse to establish a rule that a standard of care can only be proven by legally enforceable codes and standards. Establishment of custom and usage is sufficient. See Stewart v. Madison, 278 N.W.2d 284, 294 (Iowa 1979).

C. Damages. Defendant claims that plaintiff produced insufficient evidence of damages. Again we disagree.

Generally, injuries to realty are measured on the basis that "[i]f the property can be repaired or restored it is the reasonable cost of repair or restoration, not exceeding the fair market or actual value of the improvement immediately prior to the damage." Duckett v. Whorton, 312 N.W.2d 561, 562 (Iowa 1981). The jury was properly instructed as to this principle and returned a verdict for plaintiff in the amount of \$62,226.41 for damages the building and \$34,670.27 for consequential damages equalling a total judgment of \$96,896.68. Defendant asserts there was no testimony concerning a "before accident" fair market value.

Plaintiff testified that the market value of the building was between \$200,000 and \$250,000 immediately before the accident and approximately \$100,000 after the accident because the concrete portion of the building remained in tact. In cross-examination, plaintiff stated that his opinion was based on "the cost of replacement," rather than what a willing seller would give a willing buyer.

While the cost of repairs is always admissible on the question of damages, yet as the repairs may render the damaged property more valuable than it was before the injury, he who causes the injury is not required to bear the full expenditure for the repairs, but is only liable for the difference in the market price of the article before and after the injury.

State v. Urbanek, 177 N.W.2d 14, 16 (Iowa 1970). We note, however, plaintiff did testify in terms of "[i]f I sold the farm at that time..."

Q. No, I'm talking about your opinion of the value before. When you're saying an opinion of \$200,000, I assume you're talking about a concept of what it was worth to you and the concept of replacement rather than some concept of market value. A. Well, I suppose I would consider both. I've got to consider the market value.

Q. It's your opinion that this building had a market value that went up from 41,000 to 200,000 before? A. I'm talking about the facility.

* * *

Q. You're talking about the concrete and the building? A. As a working unit.

Appendix at 87. As noted above, plaintiff also testified that the building had a value of \$100,000 after the injury due to the remaining concrete portions. Defendant's own expert testified that the market value of the damaged structure was between \$40,000 and \$50,000. "... [A]ny alleged error in refusing to direct a verdict at the close of plaintiff's case is not available to defendant, where he thereafter introduces evidence curing defects in plaintiff's case; and in passing on the sufficiency of the evidence the court must look to the whole record as finally made." Winter v. Honeggers' & Co., Inc., 215 N.W.2d 316, 323 (Iowa 1974). In examining the record, we find the trial court did not err in submitting the issue of damages to the jury and that the jury verdict was within the permissible range of evidence.

III. Opinion Testimony. Defendant claims it was error for the trial court to exclude defendant's board chairman from testifying as to his opinion that the damages to plaintiff's building was caused by a tornado. Defendant's witness was examined in voir dire by plaintiff. The examination revealed that the witness did not have any knowledge "as to what the weather was like at the Buman farm on June 19th 1979 at five in the evening..." Plaintiff's objection, that there was improper foundation to support an opinion by the witness, was sustained by the court. Defendant's witness had read reports of weather which included all of southwest Iowa on the date in question with no specific reference to Shelby County.

"The receipt of opinion evidence rests largely in the discretion of trial courts, and we will not reverse their rulings unless manifest abuse of discretion is shown." Hegtvedt v. Prybil, 223 N.W.2d 186, 189 (Iowa 1974). The facts upon which an expert bases an opinion must "be sufficient to enable him to express an opinion that is more than mere speculation and conjecture." Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 900 (Iowa 1980). Applying these principles, we find no reversible error.

IV. Jury Instructions. Defendant further contends that the trial court erred by refusing to instruct the jury on the distinction between an independent contractor and an agent and by failing to instruct that in order for the jury to return a verdict for the plaintiff on the ground that Cook Construction was an agent of defendant, that Cook Construction had to be acting within the scope of its agency.

"Instructions must be read as a whole. [citations omitted] A party is not entitled to any particular form of instruction, but merely to instructions which fairly state the law as applied to the facts." Rumley v. Mason City, 320 N.W.2d 648, 652 (Iowa Ct. App. 1982). Our review of the jury instructions indicates that the law as instructed by the court was adequately and corrected stated and no prejudicial error occurred.

V. Tax Returns. Defendant finally argues that the court committed reversible error in not requiring plaintiff to produce its tax records since plaintiff claimed a loss of income. Defendant had previously filed a motion to produce the tax returns but plaintiff did not comply for reasons unknown. Early in plaintiff's cross-examination defendant inquired as to the whereabouts of plaintiffs' tax returns. Subsequent thereto the record indicates that counsel for the parties approached the bench and had a discussion "off-the-record." The record before this court does not reflect the fact that defendant requested any production of tax

returns at trial. Additionally, the record is devoid of any objection or rulings on the issue.

Undeniably defendant may have chosen a remedy under the Iowa Rules of Civil Procedure regarding a party's refusal to produce requested items. See Iowa R. Civ. P. 127, 134. Defendant, however, claims as error the trial court's refusal to order productions of the tax returns at the time of cross-examination. We find the absence of an adequate record precludes our review of the issue and accordingly affirm.

AFFIRMED.