IN THE COURT OF APPEALS OF IOWA

No. 8-452 / 97-631

ASHTON TILE COMPANY and ROETMAN & SON CORPORATION,
Plaintiffs-Appellants\Cross Appellees,

vs.

ALVIN STROUTH and MARGARET E. STROUTH,
Defendants-Appellees\Cross Appellants.

ALVIN STROUTH and MARGARET E. STROUTH,
Third-Party Plaintiffs,

vs.

O'BRIEN COUNTY and HALLETT MATERIALS,
Third-Party Defendants.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Osceola County, John P. Duffy, Judge.

The plaintiffs appeal from the district court's ruling entering a judgment notwithstanding the verdict on the plaintiffs' negligence claim for damages arising from the defendants' mining operations and a remittitur on the jury's award on the plaintiffs' related nuisance claim. **AFFIRMED.**

Randall G. Sease of Sease Law Firm, Hartley, for appellant.

Joseph M. Feller of Koopman, Kennedy and Feller, Sibley, for appellees.

Heard by Streit, P.J., Mahan, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Background. The plaintiffs appeal from the district court's ruling entering a judgment notwithstanding the verdict (JNOV) on the plaintiffs' negligence claim for damages arising from the defendants' mining operations and a remittitur on the jury's award on the plaintiffs' related nuisance claim. The plaintiffs claim evidence the defendants' mining operation changed the surface waterflow on plaintiffs' property created a genuine issue of fact concerning the duty the defendants owed the plaintiffs concerning such activity. The plaintiffs also assert the district court erred in ordering a remittitur claiming there was sufficient evidence to support the jury's verdict on the nuisance claim. We affirm the trial court.

The defendants cross-appealed asserting the district court erred in failing to grant them a judgment notwithstanding the verdict on the nuisance claim in view of the history of mining on the property. We affirm.

Factual setting. The plaintiffs, Ashton Tile Company and Roetman & Son (Ashton Tile), are owned and operated by Bernard Roetman and his son Fred Roetman. Ashton Tile makes concrete field tile which Roetman & Son installs. Ashton Tile's plant is located on a 3.38-acre site adjacent to property owned by the defendants, Alvin and Margaret Strouth.

Since the 1930s, the parties' property has been used for the mining of gravel and sand at various sites. In 1974, Bernard Roetman constructed a new tile manufacturing plant at the site of a previously mined pit. He located the plant twenty-three feet below ground level in the pit on the site to utilize a gravity flow to move

materials used for the manufacture of the tile. There is evidence the natural flow of water is south through the Ashton Tile property toward Otter Creek.

Until 1981 the third-party defendant, Hallett Materials, mined gravel and sand on the Strouth property adjacent to the Ashton Tile site. In 1988, the Strouths mined the sand and gravel deposits which had been left by Hallett to the west of Ashton Tile property. The Strouths excavated the area to one foot below the level of the Ashton Tile plant. The Strouths also had mining operations conducted on the property south of the Ashton Tile plant. In 1991, the Strouths permitted the third-party defendant, O'Brien County, to remove the topsoil in that area. The Strouths then contracted with the county to remove sand and gravel in the south area up to the property line of Ashton Tile. Ashton Tile claims the mining operations from 1988 through 1991 to the west and the south of its property were taken without adequate precautions to protect it.

In 1993, this area like much of Iowa suffered heavy rainfall. Ashton Tile claims water became a problem at the plant site and Ashton Tile added additional pumping capacity and dug a trench to the sump to alleviate the problem. Despite these actions, the plant was flooded in 1993 causing damages to the plant. Bernard Roetman claimed the plant suffered specific damages in the amount of $16,248. Roetman also claimed the plant had a value before the flood of $350,000 and was only worth $40,000 after the flood. Ashton Tile claims a berm constructed by the Strouths to the west of the Ashton property did not alleviate the flooding problem. Ashton Tile claims the defendants' mining operations exacerbated the flow resulting

in the damages to the property. The Strouths claim the pumping and trench installed by the plaintiffs only increased the flooding.

Procedural setting. In May 1995, Ashton Tile filed a petition against the Strouths seeking damages caused by the flooding. Ashton Tile raised a negligence claim based on allegations the Strouths materially changed the natural course of the water on Ashton Tile's property. Ashton Tile also raised a negligence per se claim asserting the mining operations conducted by the Strouths were in violation of Iowa law. A third claim asserted the Strouths' actions were reckless entitling Ashton Tile to punitive damages. Ashton Tile also filed a nuisance claim seeking abatement of the nuisance.

The Strouths filed an answer denying the allegations and asserted a counterclaim seeking monetary damages caused by Ashton Tile pumping water onto their property. The Strouths filed a cross-petition against O'Brien County and Hallett Materials seeking indemnity for damages caused by any mining operations conducted on the Strouths' property. The Strouths filed a motion for summary judgment against Ashton Tile's claims. The court overruled the motion on all counts except for granting summary judgment on the negligence per se claim. Prior to trial, the district court entered a ruling determining Ashton Tile's failure to respond to the Strouths' request for admissions in a timely manner required such matters be deemed admitted. One admission stated the plant site was flooded because of a high amount of rainfall and percolating groundwater.

Trial and verdict. At the trial, Ashton Tile presented an expert's testimony indicating the Strouths' mining operations caused increased waterflow on the plant site resulting in the flooding. The Strouths claim the testimony was based on a false assumption the mining operations were conducted at a lower depth than what actually occurred. The Strouths presented expert testimony indicating the flooding was not caused by the mining operations but rather by the extensive rainfall occurring in 1993. The Strouths filed a motion for directed verdict which the district court denied. Hallett Materials filed a motion for directed verdict on the cross-claim. The district court sustained that motion.

The court instructed the jury on negligence and nuisance. The jury found the Strouths were completely at fault for the flooding of Ashton Tile's property and awarded Ashton Tile $110,000 on the negligence claim. The jury also awarded Ashton Tile $57,181 on the nuisance claim. The jury found O'Brien County was not at fault and also entered a verdict against Strouths' counterclaim.

Posttrial rulings. The Strouths filed a motion for judgment notwithstanding the verdict asserting there was insufficient evidence to establish the negligence claim. The Strouths allege Ashton Tile did not establish the Strouths owed a duty of care to Ashton Tile, claiming the flood damages were not foreseeable. The Strouths also assert there was not substantial evidence to support the nuisance claim and the evidence was insufficient to support the damages awarded on the claim. The Strouths also filed a motion for new trial.

Thereafter, the district court entered a ruling granting the Strouths a judgment notwithstanding the verdict on the negligence claim and a remittitur on the award of damages on the nuisance claim. The court, after reviewing the history of mining operations on the property, concluded the mining operations since 1981 did not result in water damages to the Ashton plant. The court determined as a matter of law the Strouths owed no duty to Ashton Tile in this case. The court also determined there was not substantial evidence to submit the issue of diminution in the value of the plant to the jury and the jury could only award $16,248 representing the special damages indicated by Ashton Tile. The court determined the damages in excess of this amount should be subject to remittitur. The court directed that if the plaintiffs failed to remit such excess, a new trial would be ordered. Ashton Tile refused to submit to remittitur voluntarily. The court ordered a new trial.

On April 7, 1997, Ashton Tile filed a notice of appeal. On April 8, 1997, the Strouths filed a notice of cross-appeal.

Scope of review. *A. JNOV.* We review the district court's grant or denial of a motion for JNOV for correction of errors at law. Iowa R. App. P. 4; *Bredberg v. Pepsico, Inc.*, 551 N.W.2d 321, 326 (Iowa 1996). We view the evidence in the light most favorable to the party against whom the motion was made, taking into consideration every legitimate inference that may fairly and reasonably be made. Iowa R. App. P. 14(f)(2); *Bredberg*, 551 N.W.2d at 326. The motion must stand or fall on the grounds raised in the motion for directed verdict. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996).

Our only inquiry is whether there is sufficient evidence to justify submitting the case to the jury. *Bredberg*, 551 N.W.2d at 326. The motion should be denied if there is substantial evidence to support each element of the plaintiff's claims. *Id.* Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings. *Magnusson Agency v. Public Entity Nat'l Company-Midwest*, 560 N.W.2d 20, 25 (Iowa 1997); *Willey v. Riley*, 541 N.W.2d 521, 526 (Iowa 1995).

B. Remittur. In *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988), the Iowa court said:

> Our case law shows that we have been loath to interfere with a jury verdict. In considering a contention that the verdict is excessive, the evidence must be viewed in the light most favorable to the plaintiff. *DeBurkarte v. Louvar*, 393 N.W.2d 131, 139 (Iowa 1986). Fixing the amount of damages is a function for the jury. The court should interfere only when the damage award is "flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support." *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984). We have stated that the most important of these reasons is whether there is support in the evidence. *Miller v. Young*, 168 N.W.2d 45, 53 (Iowa 1969) (quoting *Mazur v. Grantham*, 255 Iowa 1292, 1303, 125 N.W.2d 807, 813-14 (1964)). A verdict should not be set aside merely because the reviewing court would have reached a different conclusion, although the court "has inherent power to set aside a verdict which fails to do substantial justice between the parties." *Moore v. Bailey*, 163 N.W.2d 435, 436 (Iowa 1968).

Id. Before an award is made for repairs necessitated by the acts of another, the cost must be shown to be reasonable. *Stanley v. State*, 197 N.W.2d 599, 607 (Iowa 1972). Reasonableness may be shown by testimony of one qualified to express an opinion or by demonstrating the charges were paid by an insurance company. *Id.*

Discussion. *A. Negligence.* On appeal of the ruling on the negligence claim, Ashton Tile claims there was sufficient evidence particularly regarding the flow of surface water to permit a determination the flooding was foreseeable; therefore the Strouths owed a duty to Ashton Tile to prevent the damages caused to the plant. We disagree. Much of the discussion during oral arguments centered on the nature of this case -- whether it is a surface-water case or a groundwater case. Ashton Tile argued the mining performed on the Strouths' land changed the flow of surface water. The Strouths presented evidence of past mining without complaint by Ashton Tile and without injury to Ashton Tile's plant. An untimely response by Ashton Tile to requests for admissions caused the court to deem the requests admitted. Consequently, Ashton Tile admitted the flooding was the result of high rainfall and percolating groundwater from a high water table.

A threshold question in any negligence action is whether the defendant owes a duty to the plaintiff. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). Negligence is the breach of a legal duty requiring the actor to conform to a certain standard of conduct, to protect others against unreasonable risks. *Lewis v. State*, 256 N.W.2d 181, 188 (Iowa 1977). "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Island Ry. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928). "The law's standard is one of reasonable foresight, not prophetic vision." *Bain v. Gillispie*, 357 N.W.2d 47, 49 (Iowa App. 1984) (citing to 57 Am.Jur.2d *Negligence*, §§ 57-62 (1971)). In the case before us, the court concluded

the damage to the Ashton Tile plant was not a foreseeable consequence of the mining on the Strouths' land. Viewing the evidence in the light most favorable to Ashton Tile, we determine there was not substantial evidence the damage was foreseeable. Without foreseeability there is no duty. Without a duty, there can be no negligence. The court should not have submitted this issue to the jury. The court did not err in granting the Strouths' motion for judgment notwithstanding the verdict on Ashton Tile's negligence claim. We affirm the grant of JNOV.

B. Nuisance. Concerning the nuisance award, Ashton Tile claims there was sufficient evidence to support the award and Ashton Tile should have been entitled to an abatement of the nuisance. In response, the Strouths claim the district court correctly determined the award on the nuisance claim was excessive because Ashton Tile failed to present substantial evidence of fair market value of the property. The Strouths further claim Ashton Tile failed to preserve error on the issue of a temporary nuisance and failed to show sufficient evidence of causation on the nuisance claim.

When a nuisance is permanent, the measure of damages is the diminution in market value of the property. *Mel Foster Co. Prop. v. American Oil Co.*, 427 N.W.2d 171, 175 (Iowa 1988). Special damages proven may also be recovered. *Weinhold v. Wolff*, 555 N.W.2d 454, 465 (Iowa 1996). The fair market value of property is the amount a willing buyer and a willing seller could agree on in an arms-length transaction. *Jones v. Iowa State Highway Comm'n*, 259 Iowa 616, 621-22, 144 N.W.2d 277, 280 (Iowa 1966). Ashton Tile presented no expert testimony on the fair market value of the plant. Nor did Ashton Tile present evidence from comparable

sales in the area, because of the unique nature of the property. Without proper evidence of the fair market value of the property, the jury could not make any award based on a diminution in value.[1] We conclude this issue should not have been submitted to the jury because no substantial evidence supports it. *See Harsha v. State Sav. Bank*, 346 N.W.2d 791, 799 (Iowa 1984). The district court properly ordered remittur of that portion of the damage award not attributable to special damages. We affirm the remittur order.

C. Cross-appeal on Nuisance. As a cross-appeal issue, the Strouths claim the district court erred in submitting the nuisance claim to the jury in light of the history of mining operations at the site. The Iowa Supreme Court has stated:

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[1] In their brief, appellants contend at page 20, "Plaintiff's witness, Bernard Roetman, testified that the building had a value of $350,000 before the damage and a value of $40,000 after the damage." We are then referred to page 134 of the appendix. When we turn to page 134 of the appendix, we find that page is part of the trial court's ruling, and the finding of the trial court at that page is, "The court permitted the plaintiffs to re-call Bernard Roetman to attempt to establish the market value of the building. Mr. Roetman testified that the cost of the building was $350,000 and that he had made certain repairs to the building. He testified that the building had a value of $350,000 before the damage and a value of $40,000 after the damage. Mr. Roetman testified that the value he places on the building is the value to himself." This testimony does not rise to the level of fair market value which, as the court further found, the price a willing buyer, under no compulsion to buy, would pay and a willing seller, under no compulsion to sell, would accept. *Jones v. Iowa St. Highway Comm'n*, 259 Iowa 616, 622, 144 N.W.2d 277 (1966).

Appellants also, at page 20, call to our attention that the testimony at trial established the property had a $135,297 pre-flood value and a post-flood value of $117,583 and that the post-flood valuation was due to depreciation and not flooding according to the defendants. We are referred to page 501 of the appendix and there the assessor, in attempting to arrive at a value, stated the decrease in valuation was not due to flood damage but due to additional depreciation. In fixing 1996 valuations, the assessor calculated land value, improvements, machinery and equipment with a total value of $108,057.

> A fair test of whether the operation of a lawful trade or industry constitutes a nuisance has been said to be the reasonableness of conducting it in the manner, at the place and under the circumstances in question. *Riter v. Keokuk Electro-Metals Co.*, supra, 248 Iowa 710, 722, 82 N.W.2d 151, 158; *Schlotfelt v. Vinton Farmers' Supply Co.*, supra. Thus the question whether a nuisance has been created and maintained is ordinarily one of fact, and not of law, depending on all the attending or surrounding circumstances. Each case of this nature must depend on its own facts. *Casteel v. Town of Afton*, 227 Iowa 61, 65, 287 N.W. 245, 247; *Amdor v. Cooney*, supra, 241 Iowa 777, 780, 43 N.W.2d 136, 139; *Kellerhals v. Kallenberger*, supra, 251 Iowa 974, 980, 103 N.W.2d 691, 695. See also 66 C.J.S. *Nuisances* § 22, page 774; 39 Am.Jur., *Nuisances*, § 47, page 332.

Bates v. Quality Ready-Mix Co., 261 Iowa 696, 703-04, 154 N.W.2d 852, 857 (Iowa 1967). We conclude the evidence presented engendered a question for the jury. Therefore the trial court did not err in submitting the question of nuisance to the jury and we affirm the trial court on this issue.

For the reasons set forth above, we affirm the trial court on the issues raised both in the appeal and the cross-appeal.

AFFIRMED.