2007-Ohio-7232

JERRY E. VONDRELL Plaintiff

v.

OHIO DEPARTMENT OF NATURAL RESOURCES Defendant

No. 2007-03358-AD

Court of Claims of Ohio

December 4, 2007

Sent to S.C. reporter 1/30/08

MEMORANDUM DECISION

{¶1} Plaintiff, Jerry E. Vondrell, is the owner of real property abutting and adjacent to the lake at Grand Lake St. Marys State Park ("Park"), a facility operated and maintained by defendant, Department of Natural Resources ("DNR"). On April 2, 2005, at approximately 3:00 p.m., a large tree, located on Park property, fell over and struck plaintiffs seawall causing damage to a section of the concrete structure. Plaintiff maintained the fallen tree that damaged his seawall was dead at the time it fell. Plaintiff submitted two photographs depicting the fallen tree and damaged section of seawall. Plaintiff alleged his property damage was proximately caused by negligence on the part of DNR in maintaining a hazardous condition (dead tree) on Park property. Consequently, plaintiff filed this complaint seeking to recover $2, 500.00, the cost of repairing his damaged seawall. The filing fee was paid.

{¶2} Defendant contended the sole cause of plaintiffs property damage was, "sustained high winds strong enough to knock down a dozen trees." Defendant submitted copies of weather observations recorded at the Dayton International Airport for a twenty-three hour period on April 2, 2005. The observations included wind velocity and wind gust measurements taken at the airport which is located approximately 70 miles southeast of plaintiffs property. Wind speed variances from 9 to 38 mph were measured with recorded wind gust measurements from 25 to 47 mph were reported on April 2, 2005, at the Dayton International Airport. Defendant asserted sustained high winds and wind gusts alone felled the cottonwood tree that damaged plaintiffs seawall. Defendant submitted documentation showing Park personnel removed twelve fallen trees Park wide during the week beginning April 4, 2005, including the cottonwood tree. Defendant did not produce evidence to prove all of the twelve trees mentioned were brought down by high winds on April 2, 2005, but did contend the winds did indeed fell all twelve trees. Furthermore, defendant did not record the condition of the twelve fallen trees with the exception of the damage-causing cottonwood, which DNR personnel acknowledged was dead. Defendant related sustained winds of 38 mph and gusts of up to 47 mph were recorded in the Park area about the time plaintiff reported the cottonwood fell, about 3:00 p.m. on April 2, 2005. Therefore, defendant maintained wind and wind alone felled the tree that damaged plaintiffs seawall.

{¶3} Defendant filed a written report of the April 2, 2005, property damage incident compiled by Park personnel on April 9, 2007, after receiving information from plaintiff on March 30, 2007. It was noted in the report that a large dead cottonwood fell over on April 2, 2005, and damaged a section of plaintiffs seawall. According to information in the report, the dead cottonwood fell from Park owned property onto plaintiffs seawall. The reporting officer recorded wind gusts of up to 53 mph were indicated by the National Weather Service on April 5, 2005, and a total of twelve fallen trees were cleaned up in the Park area between April 4 and April 7, 2005. This report also noted that DNR personnel Park Manager Morton, and assistant managers Miller and Pyles all informed the reporting officer that they had no prior knowledge the cottonwood was dead and had no prior knowledge the tree was likely to constitute a falling hazard. No reports or calls about dead trees were received before April 2, 2005, according to the April 9, 2007 report compiled by defendant' s employee.

{¶4} Defendant denied any liability in this matter claiming plaintiffs property damage was attributable solely to an "Act of God" (high winds) and not the result of any negligence on the part of DNR personnel. Defendant stated, "[i]t is well settled Ohio law that if an 'Act of God' is so unusual and overwhelming as to damage by its own power, without reference to and independently of any negligence by defendant, there is no liability. *Piqua v. Morris* (1918), 98 Ohio St. 42, 49." Defendant offered Act of God events invoking legal significance include earthquakes, violent storms, lightning, and unprecedented floods. *Piqua*, at 47-48; *Triplett v. Cowan Lake State Park*, Ct. of Cl. No. 2003-08932-AD, 2003-Ohio-7132. Accordingly, in regard to the instant action, defendant would include high velocity wind gusts as an Act of God preventing a finding of liability for the damage claimed.

{¶5} Defendant also denied any negligent act or omission on the part of DNR personnel proximately caused the damage to plaintiffs seawall. Defendant cited *Heckert v. Patrick* (1984), 15 Ohio St.3d 402, 405, 15 OBR 516, 473

N.E.2d 1204, and *Bertram v. Ohio Dept. of Transp.*, Ct. of Cl. No. 2002-07924-AD, jud, 2003-Ohio-2608, for the proposition that in order for a plaintiff to recover damages for injury caused by a fallen tree, evidence must establish defendant had either actual or constructive notice of the condition of the tree and its likelihood to constitute a danger from falling.

{¶6} Plaintiff filed a response, stating, "the tree that fell was very tall and was dead when I bought the adjacent property in 1999." Therefore, according to plaintiff, the condition of the cottonwood tree was present for more than five years prior to the April 2005 incident forming the basis of this claim. Additionally, plaintiff noted DNR personnel were observed in the area around the dead cottonwood trees many times between 1999 and 2005. Plaintiff claimed DNR employees "knew the large tree was a hazard [and] . . . knew this tree should be removed." Plaintiff contended his property damage was proximately caused by negligence on the part of defendant in maintaining a known hazard on Park premises and not merely by high winds falling a healthy tree.

{¶7} Defendant was correct in pointing out that no liability can attach to an Act of God. "An act of God must proceed from the violence of nature or the force of the elements alone and the agency of man must have nothing to do with it." *GTR Land Co. v. Wilson Cabinet Co.*, 1988 Ohio App. LEXIS 5393*13 (Dec. 30, 1988), Holmes App. No. CA-386 unreported, quoting 1 0. Jur. 2d, Act of God, at 2. However, in a situation where two causes contribute to an injury, one cause which is defendant's negligence and the other cause an Act of God, defendant may be held liable if plaintiffs damage would not have happened but for defendant's negligence. *Nationwide Ins. Co. v. Jordan* (1994), 64 Ohio Misc.2d 30, 639 N.E.2d 536. If proper care and diligence on the part of defendant would have avoided the act, it is not excusable as an Act of God. *Bier v. City of New Philadelphia* (1984), 11 Ohio St.3d 134, 11 OBR 430, 464 N.E.2d 147. Essentially, if defendant's negligent act concurs with an Act of God to cause damage, defendant cannot escape liability. To establish actionable negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and an injury proximately resulting therefrom. *Reitz v. May Co. Dept. Stores* (1990), 66 Ohio App.3d 188, 191, 583 N.E.2d 1071, citing *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. Failure to prove any element is fatal to a negligence claim. *Whiting v. Ohio Dept. of Mental Health* (2001), 141 Ohio App.3d 198, 202, 750 N.E.2d 644, following *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 28 OBR 410, 504 N.E.2d 19. However, "[i]t is the duty of a party on whom the burden of proof rests to produce evidence which furnishes a reasonable basis for sustaining his claim. If the evidence so produced furnishes only a basis for a choice among different possibilities as to any issue in the case, he fails to sustain such burden." Paragraph three of the syllabus in *Steven v. Indus. Comm.* (1945), 145 Ohio St. 198, 30 O.O. 415, 61 N.E.2d 198, approved and followed.

{¶8} In *Piqua*, 98 Ohio St. 42, 120 N.E. 300, the court stated at paragraph one of the syllabus "[t]he proximate cause of a result is that which in a natural and continued sequence contributes to produce the result, without which it would not have happened. The fact that some other cause concurred with the negligence of a defendant in producing an injury, does not relieve him from liability unless it is shown such other cause would have produced the injury independently of defendant's negligence." Plaintiff in the instant action insists defendant's negligence in knowingly maintaining a hazardous condition (dead tree) on Park premises was the proximate cause of the damage to his seawall. Conversely, defendant argued the damage to plaintiffs property was solely caused by an Act of God. Furthermore, defendant denied any DNR personnel knew or had reason to know the damage-causing cottonwood tree was dead and therefore, presented a hazard. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski* (1984), 14 Ohio St.3d 51, 14 OBR 446, 471 N.E.2d 477.

{¶9} Although strict rules of evidence do not apply in administrative determinations, plaintiff must prove his claim by a preponderance. The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 26 O.O.2d 366, 197 N.E.2d 548. The court finds plaintiffs assertions persuasive regarding the fact the damage-causing cottonwood was dead, DNR personnel had years of prior knowledge the tree was dead, and DNR knew or should have known the dead tree presented a falling hazard. The trier of fact does not find defendant' s assertions concerning lack of knowledge about the condition to be persuasive. Photographic evidence has established the damage-causing tree was clearly dead.

{¶10} In a situation where two causes contribute to an injury, one cause which is defendant's negligence and the other cause an Act of God, liability shall attach to defendant if plaintiffs damage would not have happened but for defendant's negligence. *Nationwide Ins. Co.*, 64 Ohio Misc.2d 30, 639 N.E.2d 536. If proper care and diligence on the part of defendant would have avoided the act, it is not excusable as an Act of God. *Bier.*

{¶11} The trier of fact in the instant claim finds plaintiff has presented sufficient evidence to establish defendant knew or should have known the damage-causing cottonwood tree was dead and thereby constituted a

hazardous condition. The court concludes defendant's negligence in maintaining the dead tree on Park premises proximately caused plaintiff's damage. Plaintiff has the burden to present some evidence in regard to the condition of the damage-causing tree in order to establish a notice determination. See *Shupe v. Department of Transportation*, Ct. of Cl. No. 2003-04457-AD, jud (rev), 2004-Ohio-644. Evidence has shown the tree was dead for more than five years before the April 2, 2005, damage event. The facts of the instant claim support the conclusion plaintiff's damage was proximately caused by defendant maintaining a known hazardous condition. The damage would have occurred when defendant's negligence coincided with forces of nature. Consequently, defendant is liable to plaintiff for the damage amount claimed, plus the $25.00 filing fee which may be reimbursed as costs pursuant to R.C. 2335.19. See *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc.2d 19, 587 N.E. 2D 990.

ENTRY OF ADMINISTRATIVE DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of $2, 525.00, which includes the filing fee. Court costs are assessed against defendant.