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Court of Appeal, Third District, California.
Katherine P. GRIGG, Plaintiff and Appellant,
v.
Dennis TAYLOR, Defendant and Respondent.

No. C050070

2006 WL 1756843

(Super.Ct. No. SCV 16378).

June 28, 2006.

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Brett E. Rosenthal, James & McClellan, Sacramento, CA, for Defendant and Respondent.

ROBIE, J.

***1** Plaintiff Katherine Grigg was injured when she was hit by a falling tree while standing on a public road. The property from which the tree had fallen was owned by defendant Dennis Taylor. Grigg sued Taylor on the theories of negligence and nuisance for failing to maintain the trees on his property and sought general and compensatory damages, as well as punitive damages. The court granted Taylor's motion for nonsuit regarding punitive damages, and the jury found for Taylor on the remaining claims. Thereafter, the court denied Grigg's motions for new trial and judgment notwithstanding the verdict, which were based on arguments that the verdicts were not supported by substantial evidence.

On appeal, Grigg contends: (1) there was insufficient evidence to support the jury's verdict that Taylor was not negligent; (2) there was insufficient evidence to support the jury's verdict that Taylor did not create a nuisance; and (3) the trial court erred in granting Taylor's nonsuit motion regarding punitive damages. Disagreeing with these contentions, we will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On a proverbial dark and stormy night with wind gusts of 60 to 70 miles per hour, motorist Katherine Grigg encountered a large tree blocking her way on

Mount Pleasant Road in Lincoln. The tree had fallen from Dennis Taylor's property, which was adjacent to the road. Another motorist traveling on the road, David Eggert, parked behind Grigg's car. Grigg and Eggert got out of their vehicles and determined the tree was too big for them to move. As Eggert was thinking of an alternate route they could take, another tree fell, striking both Grigg and Eggert. Grigg screamed for Eggert's help, but he was pinned underneath the tree.

Grigg got free and ran down the road for help. A few minutes later, she encountered a nearby resident, James Baird, who called 911. Eventually, paramedics arrived and took Grigg and Eggert to the hospital. Grigg was released early the next morning, and Eggert was released two to three weeks later. After Eggert's release, Grigg called Eggert to ask whether they should sue Taylor. Eggert replied, "[W]hy? ... this was what I called an act of God."

Taylor owned the five-acre parcel of land that abuts Mount Pleasant Road. The tree that had fallen on Grigg and Eggert was one-half of a "V" shaped double-trunk tree. The tree's other trunk had fallen approximately two weeks to a month before the accident. When the first trunk fell, Taylor inspected the remaining trunk and believed it was not going to fall because several other double-trunk trees on his property were still standing after one trunk had fallen. He decided not to "take care of" the remaining trunk right away "[b]ecause there w[ere] a series of storms" and he "didn't feel like getting wet."

Once a week, Taylor walked around the perimeter of his property to check that his fence was intact. At that time, he would look to see whether any trees had fallen down. Before the accident, he had cut down four or five trees he thought were dangerous. He believed approximately three "[t]rees and branches" on his property fell every year. His "plan for dealing with trees that [had] fall[en] on [his] property" was to "[c]ut them up and use them for firewood ." Placer County does not have any "law, ordinance, or regulation that requires landowners to prune their trees."

***2** On the night of the accident, Taylor had been called into work by his employer, the Placer County Department of Public Works, Roads Division, to operate machinery for "repair[ing] roadways" and "tak[ing] care of downed trees." As he "was getting [his] stuff together and getting ready to go in," his daughter told him that a tree had fallen down, blocking Mount Pleasant Road.[FN1] When he arrived at work, Taylor told his supervisor about the downed tree, and "a couple of guys from up here went down and cut it up." Had Taylor believed the remaining trunk was going to fall, he "would have probably reported it to [his] supervisor."

> FN1. This was the first tree that had fallen and not the one that struck Grigg and Eggert.

James Baird, the man who called 911 after the accident, lived a block and one-half from Taylor. He passed Taylor's property "[n]umerous times every day" and believed there was "nothing [on the property] that looked hazardous." The weather on the night of the accident was "horrible" and the storm was one of the worst "in a while." A large tree on Baird's property also fell down that night without warning.

DISCUSSION

I

There Was Substantial Evidence Taylor Was Not Negligent

Grigg contends the trial court erred in denying her motion for new trial because there was insufficient evidence that Taylor was not negligent. We disagree.

In reviewing the denial of a motion for new trial or judgment notwithstanding the verdict on the basis of insufficient evidence, our standard of review is the same: "[O]ur power *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury." (*Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 617; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.) "[A]ll conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) A reviewing court will not reweigh the evidence. (*Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.)

In her argument on appeal, Grigg pays only lip service to the substantial evidence standard of review and ignores the evidence supporting the jury's verdict that Taylor was not negligent. As we will show, the evidence viewed in a light most favorable to the verdict was sufficient to show Taylor was not negligent, i.e., that he did not fail "to use reasonable care to prevent harm to [him]self or to others." (CACI No. 401.)

On a weekly basis, Taylor walked around the perimeter of his property and looked out for fallen trees. In the past, he had cut down four or five trees he thought were dangerous, even though there is no "law, ordinance, or regulation that requires landowners [in Placer County] to prune their trees."

Approximately two weeks to a month before the accident, Taylor had inspected the remaining trunk because the other half of the tree had fallen. He was not concerned the remaining trunk was in danger of falling because there were several other double-trunk trees on his property that were still standing after one trunk had fallen. Taylor's neighbor also had not seen anything on Taylor's

property that looked as though it posed a hazard, and he himself had a tree that had fallen down without warning on the evening of the storm.

***3** The evidence we have just recounted, most of which Grigg fails to mention in her argument, was sufficient to support the jury's verdict that Taylor was not negligent in maintaining his property. Accordingly, the trial court did not err in denying the new trial motion based on insufficiency of evidence.

II

There Was Substantial Evidence
Taylor Did Not Create A Nuisance

Grigg contends the court erred in denying her motions for a "directed verdict" [FN2] and judgment notwithstanding the verdict because there was insufficient evidence Taylor did not create a nuisance.[FN3] Again, we disagree.

> FN2. In her briefs, Grigg erroneously refers to a motion for a directed verdict when she really filed a motion for a new trial.
>
> FN3. Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, ... or ... obstruct[s] ... the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ... street, or highway."

Grigg's argument is based, in part, on the theory that a defendant's liability for creating a nuisance constitutes negligence per se or does not even require negligence. To support her theory, Grigg cites cases in which an intentional act created the nuisance. (See, e.g., *Portman v. Clementina Co.* (1957) 147 Cal.App.2d 651, 654 [defendant's dumping of rocks and dirt on the street interfered with normal drainage, flooding plaintiff's property]; *Shields v. Wondries* (1957) 154 Cal.App.2d 249, 252 [defendants' development of their property caused water to seep into plaintiff's property].)

In this case, however, there was no such intentional act that created the alleged nuisance. As long as the trunk remained in place on Taylor's property, it did not constitute an obstruction. It was only the unintentional falling of the trunk onto the road that created the obstruction. Taylor's liability, therefore, was not absolute and could be predicated only on a showing of negligence. (*Coates v. Chinn* (1958) 51 Cal.2d 304, 307.)

To the extent Grigg argues that the uncontradicted evidence showed Taylor created a nuisance by his negligence in failing to take precautions against the risk of a falling tree trunk, we reject the argument for the reasons discussed in

part I of the Discussion. For those same reasons, we find substantial evidence to support the jury's verdict that Taylor did not "violate Civil Code [s]ection 3479, when a tree fell from his property onto a public road obstructing the entire road." Accordingly, the trial court did not err in denying Grigg's motions for a new trial or judgment notwithstanding the verdict.

III

Any Error In Granting The Nonsuit
On The Issue Of Punitive Damages Was Harmless

Grigg contends the trial court erred in granting Taylor's nonsuit motion on her punitive damages claim because Taylor's "conscious choice ... to neglect his duties which are prescribed to protect the public, is despicable conduct which is the basis for punitive damages." Taylor responds that any error in granting the nonsuit motion was harmless because the jury found he was not negligent and did not create a nuisance. We agree with Taylor.

A nonsuit motion is a procedural device that allows the defendant to challenge the sufficiency of the plaintiff's evidence either after the plaintiff's opening statement or the presentation of the plaintiff's case. (Code Civ. Proc., § 581c, subd. (a).) The defendant is entitled to nonsuit if the evidence presented by the plaintiff to support her claim is insufficient as a matter of law. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117-118 .)

***4** Here, the jury found Taylor was not negligent in maintaining his property and did not create a nuisance. There was substantial evidence to support those verdicts. Given the jury's verdicts, any error in granting the nonsuit on Grigg's theory that Taylor's conduct was "despicable" was harmless. (See *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 106.)

DISPOSITION

The judgment is affirmed. Taylor shall recover his costs on appeal. (Cal. Rules of Court, rule 27(a)(1).)

We concur: NICHOLSON, Acting P.J., and BUTZ, J.
Cal.App. 3 Dist.,2006.
Grigg v. Taylor
Not Reported in Cal.Rptr.3d, 2006 WL 1756843 (Cal.App. 3 Dist.)