107 P.3d 1262 (Kan.App. 2005)

AMERICAN FAMILY INSURANCE, Appellant,

v.

Dean ANDERSON, Individually & d/b/a Anderson Butik, Appellee.

No. 92,183.

Court of Appeals of Kansas

March 18, 2005

Editorial Note:

This case does not have precedential value under Kansas supreme court rule 7.04 (f) and may only be cited as persuasive authority on a material issue not addressed by a published Kansas appellate court decision.

Appeal from McPherson District Court; Richard B. Walker, judge. Opinion filed March 18, 2005. Affirmed.

Jeff Lee McVey, of McPherson & McVey Law Offices, Chtd., of Great Bend, for appellant.

Nichole Mohning-Roths, of Clark, Mize & Linville, Chartered, of Salina, for appellee.

Before MARQUARDT, P.J., MCANANY, J., and BRAZIL, S.J.

MEMORANDUM OPINION

PER CURIAM.

American Family Insurance (American) appeals the district court's decision directing a verdict in favor of Dean Anderson, individually and doing business as Anderson Butik (Anderson), on American's claim of negligence, as well as the court's finding that the tree did not constitute a nuisance. We affirm.

Anderson owned property in Lindsborg, Kansas, adjacent to property owned by Robert and Roberta Stenfors. On July 28, 2002, at approximately 6:30 p.m., a hackberry tree on Anderson's property blew over onto the Stenfors' garage. Pursuant to the terms of a homeowner's insurance contract between American and the Stenfors, American paid for removal of the tree and repairs to the garage. The amount paid by American totaled $24,837.47.

The rest of the facts are known to the parties and will not be repeated here except in our analysis of the issues.

Negligence

American argues the district court erred in directing a verdict in favor of Anderson on its negligence claim. Specifically, American claims the court improperly relied on the stipulation regarding Anderson's lack of knowledge as set forth in the pretrial order and disregarded contrary evidence presented at trial.

" 'When ruling on a motion for directed verdict, the trial court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motion must be denied. A similar analysis must be applied by an appellate court when reviewing the grant or denial of a motion for directed verdict.' [Citation omitted.]" *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 202, 4 P.3d 1149 (2000).

Whether to grant a motion for directed verdict is a question of law for the court's determination, however, where no evidence is presented on an issue or where the evidence is undisputed and is such that the minds of reasonable persons may not draw differing inferences or arrive at opposing conclusions. *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 126, 815 P.2d 72 (1991).

As Anderson correctly notes, to prove its negligence claim, American was required to establish the existence of a duty, a breach of that duty, an injury, and a causal connection between the breach of duty and the injury. See *Williamson v. City of Hays*, 275 Kan. 300, 311, 64 P.3d 364 (2003). In granting Anderson's motion for directed verdict, the district court found American failed to prove Anderson had a duty to remove the tree or take any other preventive action, as Anderson did not have actual or constructive knowledge of the tree's defective nature.

The pretrial order is determinative of this issue. A pretrial order controls the subsequent course of the case unless modified by agreement of the parties or by the court to prevent manifest injustice. K.S.A.2004 Supp. 60-216(e); *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 18, 61 P.3d 68 (2002). At trial, American conceded it did not seek to modify the pretrial order in which it stipulated that Anderson lacked actual or constructive knowledge of any defect regarding the tree. Certainly, without knowledge of the tree's condition, Anderson could not be found negligent.

Nevertheless, American urges this court to look beyond the pretrial order to the evidence presented at trial. Granted, both the Stenfors and Roy Lister, who removed the tree from the Stenfors' property, referred to an incident 10 or 11 years ago in which Lister recommended that Anderson have the subject tree removed along with an adjacent rotted tree. Lister further testified, however, that the subject tree apparently healed itself and became healthy over time. In fact, Lister saw no outward signs of disease or decay on the tree and did not believe a layperson could see any indications of internal rotting. Consequently, as the district court correctly found, the testimony presented at trial also failed to establish that Anderson had actual or constructive knowledge of the tree's defects.

The district court did not err in granting Anderson's motion for directed verdict as to American's claim of negligence.

Nuisance

American argues the district court also erred in finding the tree did not constitute a nuisance.

As Anderson states, whether the tree constituted a nuisance is a question of fact which this court reviews under a substantial competent evidence standard. See *Pierce v. Casady*, 11 Kan.App.2d 23, 25, 711 P.2d 766 (1985). Accordingly, American's suggestion that the question is one of law is incorrect.

"A person is liable in damages for the creation or maintenance of anything that unreasonably interferes with the rights of another, whether in person, or property, and thereby causes [him or her] harm, inconvenience, or damage." PIK Civ.3d 103.06. As the district court noted, a nuisance is not a separate type of tortious conduct, in this case, American's nuisance claim was a "sub-variant" of its negligence claim. See *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 364, 506 P.2d 1191 (1973) (nuisance is field of tort liability rather than type of tortious conduct); PIK Civ.3d 103.06 (Notes on Use) (nuisance not separate or special type of tortious conduct). In such a situation, "nuisance is a result and negligence is a cause and they cannot be distinguished otherwise." 211 Kan. at 364.

In dismissing American's claim that the tree constituted a nuisance, the district court referred to American's failure to prove Anderson had knowledge of the tree's defective nature. As the court recounted, the tree appeared healthy and contained no outwardly visible signs of decay or disease. Further, the court referred to the fact the tree withstood 90 mile per hour wind gusts in June 2002. Ultimately, the court concluded under these circumstances that a reasonable person would not have removed the tree or taken other preventive actions.

Indeed, American's failure to prevail on its negligence claim doomed its ability to establish that the tree was a nuisance. Knowledge that the tree presented a danger to the Stenfors' property was crucial, and American simply failed to prove Anderson knew or should have known of the tree's defective condition. See Annot. 54 A . L.R.4th 530, § 6(a) (landowner who knows or ought to know that tree presents danger to adjoining property or persons thereon is liable for damages caused by fall of tree or limbs therefrom).

American's attempt to characterize this situation as one of strict liability must fail. American derived its assertion that the tree was a nuisance directly from its allegation of negligence. The concept of strict liability was not discussed at trial nor was it mentioned in pleadings. Rather, American simply maintained Anderson was negligent in his failure to remove the tree prior to July 28, 2002, when it blew over.

We hold there was substantial competent evidence to support the district court's finding that the tree did not constitute a nuisance.

Affirmed.