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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000908-MR
&
NO. 2011-CA-000950-MR

ST. CHARLES CARE CENTER, INC. APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE GREGORY M. BARTLETT, JUDGE
 CASE NO. 08-CI-02539

DARRELL MEADER and
DELORIS MEADER APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: St. Charles Care Center, Inc. (“St. Charles”) appeals and Darrell Meader and Deloris Meader (collectively “Meaders”) cross-appeal from the February 4, 2011, trial order and judgment of the Kenton Circuit Court. That judgment found in favor of the Meaders in their pursuit of compensation for

damage done to their property as a result of a landslide. We affirm on all contested matters.

The Meaders' residence and adjoining property, purchased in 1967, is located in Fort Wright, Kentucky. St. Charles, constructed in 1961, is located directly adjacent to, and uphill from, the Meaders' property. In 1985 and 1992, St. Charles expanded its facilities and constructed additional buildings and streets on previously unimproved areas of its property. In an attempt to control surface water runoff, St. Charles implemented a series of catch basins and underground piping which serves to redirect the excess water into nearby Big Creek. Big Creek runs downhill, beginning at a headwall on the St. Charles property and running through the Meader property.

Following the St. Charles expansion, the Meaders replaced an 18-inch underground pipe, running the length of their driveway, with a 24-inch pipe, in order to assist with the flow of water originating from Big Creek. The culvert pipe functioned by means of an open grate, constructed at the intake of the pipe and adjacent to Big Creek, which served to redirect water from the Meader property. Testimony indicated that Big Creek occasionally flooded when the culvert pipe could not handle the flow of water coming from Big Creek.

On or about March 21, 2008, a landslide occurred on the Meader property, resulting in significant damage to their real and personal property. The Meaders brought the underlying action, alleging that the landslide was a result of unreasonable diversion of water by St. Charles into Big Creek and consequently

onto the Meader property. St. Charles moved for summary judgment and also sought to exclude the testimony of the Meaders' geotechnical engineering expert, James Hough, based on *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Following a *Daubert* hearing, the trial court denied St. Charles' motion for summary judgment and denied its motion to exclude Hough's testimony. St. Charles also sought a directed verdict and was denied. Following a jury trial, a verdict was returned in favor of the Meaders and they were awarded compensatory damages in the amount of \$120,000.00, plus interest. This appeal and cross-appeal followed.

On appeal St. Charles first argues that a jury verdict cannot stand where there is an absence of proof on an essential element of the claim. St. Charles argues that the pivotal issue in this case is "whether there was flooding from [B]ig [C]reek two days before the landslide which reached the landslide area and then soaked down to bedrock in a sufficient amount to trigger the landslide," and that there is no proof on this issue. We disagree.

The jury instruction read, in pertinent part:

You will find for the Plaintiffs if you are satisfied from the evidence as follows:

1. That the construction of the St. Charles Village and its storm water drainage system in 1985 unreasonably increased or accelerated the flow of surface water onto the Plaintiffs' property and that such increased or accelerated flow of surface water onto the Plaintiffs' property was a substantial factor in causing damage to the Plaintiffs' property.

Thus, the pivotal issues in this case appear to be: 1) whether St. Charles had unreasonably increased the flow of water onto the Meader property; and 2) whether that increased water had been a substantial factor in the landslide. What St. Charles argues is the “pivotal issue” in the case is actually a defense, or an alternative theory of causation. We note that there has been no challenge made by either party to the jury instruction.

“It is the province of the jury, not the court, to weigh the evidence.”

Williams v. Louisville & Nashville R. Co., 183 Ky. 602, 604, 210 S.W. 172, 173

(1919). Additionally, “[t]he question of credibility of witnesses is generally a

matter which addresses itself to the jury . . . [and] neither the trial court nor this

court may pass upon the credibility of witnesses.” *Roberts v. Roberts*, 310 S.W.2d

55, 57 (Ky. 1958). The Meaders presented testimony from civil engineer and land

surveyor J. Timothy King, who specializes in the control of surface water runoff.

King testified that St. Charles had failed to control the surface water runoff created

by the expansion of its facilities and instead diverted it into Big Creek. King

further testified that this diversion resulted in an unreasonable amount of excess

water being discharged onto the Meader property thereby resulting in flooding.

Additionally, St. Charles provided an expert, geotechnical engineer Don Thelan,

who also testified that the additional development of St. Charles led to an increased

flow of surface water into Big Creek and that the size of the creek had increased

significantly after the St. Charles development. Deloris Meader testified that the

creek had not flooded prior to the St. Charles expansion, but had done so numerous

times since. James Hough, a geologist and geotechnical engineer specializing in landslides, testified that the Meader property was receiving 2.52 times more water than it would during a normal rainfall because of the runoff from the St. Charles development. He further testified that water triggered the landslide. There is no denying that evidence was presented which supported the theory that the St. Charles development resulted in additional water on the Meader property and that such water was a substantial factor in the landslide. Furthermore, St. Charles was given, and employed, the opportunity to present their alternative theory of causation. Given the latitude of the jury to weigh the evidence and determine the credibility of witnesses, we find no error with its finding in favor of the Meaders.

St. Charles next argues that where there is more than one possible cause of an injury, the jury should not be forced to speculate as to the probable cause. We disagree. When one party suffers an injury, the precise role of the jury is to determine the probable cause of that injury. We further opine that the jury in this case was not left to mere speculation, but was afforded an opportunity to weigh potential causes of the landslide based on the evidence. In this case, the “other possible cause” of the landslide, which St. Charles suggests, is the direct saturation of rainfall, as opposed to flooding of Big Creek, which may have compromised the land’s integrity. “The jury are as much the judges of the inferences and conclusions to be drawn from the proven facts as they are of the facts themselves.” *McGraw's Adm'r (Lee) v. McGraw's Adm'r (Davidson)*, 293 Ky. 722, 726, 169 S.W.2d 840, 842 (1943). Furthermore, if a conclusion drawn by

the jury is one that might be derived by a reasonable mind, then that conclusion “should not be disturbed even though the inferences or deductions may not have been those we would have drawn had we been sitting as triers of fact.” *Id.*, 169 S.W.2d at 842-43. Given the evidence presented, the jury could reasonably infer that the additional water being directed onto the Meader property was a substantial factor in the creation of the landslide. In essence, St. Charles is asserting that the jury did not consider possible contributory factors to the formation of the landslide. However, the jury instructions did not command an allocation of fault to possible contributory factors and St. Charles fails to challenge the adequacy of those instructions. We must assume that St. Charles’ defense that the landslide was caused by direct rainfall, as opposed to floodwaters from Big Creek, was presented during trial. Given the evidence presented, in conjunction with the jury instructions, the jury’s failure to embrace such a theory was well within its capacity. Accordingly, we find no error.

St. Charles’ final arguments pertain to the testimony of Hough. St. Charles argues that the trial court committed clear error and abused its discretion when it failed to exclude Hough’s testimony. In essence, St. Charles contends that Hough’s testimony was based on speculation, as opposed to facts, and that the trial court therefore erred when it failed to exclude the testimony following the *Daubert* hearing. St. Charles argues that Hough’s opinion, that the landslide was caused by the flooding of Big Creek, as opposed to direct rainfall, was an “I-know-it-when-I-see-it” opinion, as opposed to an opinion based on actual data.

The purpose of a *Daubert* hearing is for the trial court to act as gatekeeper and prohibit the introduction of “unreliable, pseudoscientific evidence.” *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004). Therefore, the trial court must determine whether the expert will testify to “(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Id.* (citation omitted). Such a determination can be made by considering several factors, including, but not limited to:

(1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

Id. at 914 (citing *Goodyear Tire & Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575, 578–79 (2000)).

Typically, we would review a trial court’s findings of fact, regarding reliability of an expert, under a clear error standard. *Miller*, 146 S.W.3d at 917. However, when the trial court fails to communicate precise findings of fact, as we are faced with herein, our review for clear error is done by examining the record in order to ascertain whether there is substantial evidence to support the ruling. *Id.* Additionally, we review the trial court's determination as to whether the challenged testimony would assist the jury under an abuse of discretion standard. *Id.*

Hough's curriculum vitae included multiple degrees in geology; experience as a geotechnical engineer on more than 3,700 projects, including special expertise in slope stability and landslides; licensing in multiple states; 46 years of practice as a geologist and geotechnical engineer; and authorship of multiple books and maps, including a map of landslide prone bedrock hillsides in the Cincinnati, Ohio area, and a book on landslide in the greater Cincinnati area. His opinion, that the landslide was triggered by an excess of water in Big Creek, which flooded onto the Meader property, was supported by his investigation of the adjoining properties, rainfall records, site geology, weather records, and interviews with the landowners. St. Charles maintains that Hough's opinion was inadmissible because it was unsupported by facts and further because he was unable to ascertain the percentage of flooding attributable to Big Creek overflow versus direct rainfall on the Meader property.

During the *Daubert* hearing, the trial court made the following statements:

the purpose of this hearing [is] to determine minimal qualifications to render an opinion on the issue of this case . . . we don't try cases by the Court deciding which expert is more accurate that the next expert, that's for the fact finder . . . my function on the evidence area is to make sure that the Jury is getting a qualified expert opinion, whether he's wrong or right is not my concern, that's their concern . . . it's not for me to weigh the testimony.

We agree with the trial court's classification of the *Daubert* hearing. The transcripts indicate that St. Charles' challenge to Hough's testimony during the hearing was based wholly on its failed attempts to extract an exact allocation of

flooding due to direct rainfall versus Big Creek overflow. Although we agree that having a precise allocation may be relevant in assisting St. Charles with its defense, we do not agree that it is a necessary element in determining the admissibility of Hough's testimony. Moreover, the allocation of flooding to direct rainfall and Big Creek flooding was not an issue presented to the jury. Instead, the jury was charged with the task of determining whether St. Charles had unnecessarily increased the flow of water onto the Meader property and whether such increase was a *substantial factor* in the landslide. Hough recited the amount of water being discharged from St. Charles into Big Creek, the amount the Meader property was capable of handling, and based his opinion on thereupon. In essence, St. Charles challenged the breadth of Hough's testimony, not necessarily his methodology. In short: St. Charles merely disagreed. A differing of opinions does not serve as a basis for witness exclusion. Accordingly, we find no error with the trial court's refusal to exclude Hough's testimony.

In their cross-appeal, the Meaders first argue that the trial court erred when it failed to enter a permanent injunction preventing St. Charles from continuing to discharge its surface water onto the Meader property. "Relief by way of mandatory injunction is an extraordinary remedy, and should not be invoked lightly." *Tharp v. Louisville & Nashville R. Co.*, 307 Ky. 322, 324, 210 S.W.2d 954, 955 (1948). "[A]n injunction should not be granted unless it clearly appears that the complaining party will, unless it be granted, suffer great and irreparable injury that cannot be adequately ascertained or compensated for in a

suit for damages.” *Wunderlich v. Scott*, 242 Ky. 481, 488, 46 S.W.2d 753, 756 (1932) (internal quotation and citation omitted). Given the Meaders’ success at recovering compensation for their injuries suffered as a result of the March 21, 2008, landslide, they have failed to show that they will be unable to obtain adequate redress for any future damages. Accordingly, we find no error with the trial court’s denial of a permanent injunction.

The Meaders also argue that the jury instructions improperly limited their damages to diminution in value. However, the Meaders fail to articulate exactly how, based upon the circumstances of their case, the recovery limit was improper. Furthermore, the Meaders fail to show where in the record this argument was preserved for our review. Accordingly, we find no error.

For the foregoing reasons, the February 4, 2011, order and judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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