STATE OF MICHIGAN

COURT OF APPEALS

SEW INDUSTRIES, INC.,

Plaintiff-Appellee,

v

FLORENCE I, INC., and FLORENCE CEMENT CO.,

Defendants-Appellants.

UNPUBLISHED
November 4, 1997

No. 191762
Oakland Circuit Court
LC No. 93-456964-CE

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Defendants appeal as of right from the judgment entered in favor of plaintiff after a jury awarded plaintiff $29,590 in damages for defendants' negligence and found defendants liable for public nuisance, trespass, and contribution pursuant to the Michigan Environmental Response Act (MERA), MCL 299.601 *et seq.*; MSA 13.32(1) *et seq.*,[1] but awarded no damages on these counts. Defendants also appeal the court's denial of their motion for a JNOV, for a new trial and/or for remittitur. We affirm.

Defendants first argue that the trial court abused its discretion in denying their motions for a directed verdict and JNOV because plaintiff did not provide any evidence, other than speculation, that defendants were the source of the contamination on plaintiff's property. Defendants argue that no tests were performed on their property to determine that the staining observed on the ground was actually petroleum. They also argue that the environmental evaluation revealed significant levels of acetone contamination, which was most likely caused by plaintiff.

In reviewing a trial court's denial of a directed verdict motion, this Court reviews all evidence admitted until the time of the motion to determine whether a question of fact existed. *Lamson v Martin (After Remand)*, 216 Mich App 452, 455; 549 NW2d 878 (1996). This Court considers the evidence in the light most favorable to the nonmoving party. *Id.* When the evidence could lead

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

reasonable jurors to disagree, the trial court may not substitute its judgment for that of the jury. *Id.* Directed verdicts are not favored in negligence cases. *Id.*

When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1997). Circumstantial evidence and permissible inferences therefrom may constitute sufficient proof of negligence. *Mull v Equitable Life Assurance Society of the United States,* 196 Mich App 411, 421; 493 NW2d 447 (1992), aff'd 444 Mich 508; 510 NW2d 184 (1994).

Plaintiff presented the testimony of Jack DeLorean, plaintiff's realtor, and Kevin Kruszewski, an environmental contamination specialist with TEC, both of whom testified that they had seen heavy staining on the ground surrounding the storage tanks on defendants' property adjacent to plaintiff's property. Soil samples from plaintiff's property revealed that the soil was contaminated by phenanthrene and benzo anthracine, chemicals found in motor oil. Angelo Lanni, defendant Florence Cement Company's executive vice-president, testified that defendants stored motor oil in the storage tanks on the property. The contamination was limited to small area of plaintiff's property adjacent to defendants' property and the motor oil storage tanks, which lead TEC to conclude that the source of the contamination was the staining on defendants' property. Although the environmental testing also revealed a low concentration of acetone, Kruszewski testified that no excavation would have been required based on the acetone alone but was merited to remediate the other contamination. Taken in a light most favorable to plaintiff, this evidence was sufficient to create an issue for the jury regarding whether the source of the contamination emanated from defendants' property.

Defendants next argue that plaintiff failed to state a claim for contribution under the MERA, MCL 299.612; MSA 13.32(12),[2] because there was no evidence of a release of a hazardous substance. Defendants argue that the testimony of plaintiff's expert indicated that the contamination did not pose any threat to the health, safety and welfare of the general public. Therefore, there was no release of hazardous substances as defined in MERA. We disagree.

MCL 299.612; MSA 13.32(12) provides that the owner or operator of a facility from which there is a release of a hazardous substance will be liable for the cost of response activity incurred by another. The definition of a "hazardous substance" specifically includes petroleum MCL 299.603(p); MSA 13.32(3)(p). As discussed above, soil samples from plaintiff's property and adjacent to the storage tanks on defendant's property revealed that the soil was contaminated by phenanthrene and benzo anthracine, chemicals found in motor oil. Therefore, the evidence supports a finding that there was a release of petroleum, which is defined as a hazardous substance under the MERA and that plaintiff properly stated a claim for contribution under the act.

Defendants also argue MCL 299.612(2)(b); MSA 13.32(12)(2)(b) provides that plaintiff may only recover "necessary costs of response activity." Defendants argue that plaintiff incurred unnecessary costs by implementing the most expensive remedial activity. We disagree.

We find that plaintiff's costs were reasonable and necessary. Both First of America Bank and Comerica Bank refused to close the sale of plaintiff's property unless the contamination was remedied. Plaintiff's expert testified that he recommended soil removal and disposal as the method that would best suit plaintiff's needs and that alternative remedies would not have suited plaintiff's time constraints. Therefore, defendants' argument has no merit.

Defendants next argue that plaintiff failed to comply with the prerequisites of the MERA because it did not notify the MDNR of the alleged contamination. Defendants rely on MCL 299.610a; 13.32(10a), which provides in pertinent part that "the owner or operator of a facility who obtains information that there may be a release *at that facility* shall immediately take appropriate action consistent with applicable laws and rules promulgated by the department." (Emphasis added). Furthermore, the statute states that the penalty for noncompliance with this section is a fine of up to $25,000 a day. MCL 299.610a(6); MSA 13.32(10a)(6). We find that the plain language of this provision creates a duty in the owner of the property where the release occurred, which in this case would be defendants. Nowhere does it state that compliance with this section is a prerequisite suit under MCL 299.612; MSA 13.32(12). In fact, the section specifically provides that it shall not limit the liability of a person who may be liable under §12. MCL 299.610a(8); MSA 13.32(10a)(8). Therefore, defendants' argument has no merit.

Defendants next argue that plaintiff failed to provide any evidence to substantiate a claim of public nuisance. We disagree.

> A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).]

"Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152; 422 NW2d 205 (1988). "A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public." *Cloverleaf Car Co, supra* at 190.

As discussed above, we find that plaintiff did present sufficient evidence to support a finding that defendants violated MERA, which was expressly enacted to preserve the public health, safety and welfare. See MCL 299.601(a); MSA 13.32(1)(a). Furthermore, because plaintiff incurred costs of remedial activity and was forced to delay the sale of its property as a result of the contamination, we find that plaintiff has suffered a type of harm different from that of the general public. Therefore, plaintiff has presented sufficient evidence to support a claim of public nuisance.

Defendants next argue that the trial court erred in denying their motion for remittitur of damages because plaintiff failed to mitigate its damages. Defendants did not raise this issue in the trial court, however. Issues raised for the first time on appeal are not subject to appellate review. *Auto Club Ins Ass'n v Lozanis,* 215 Mich App 415, 421; 546 NW2d 648 (1996). Furthermore, on review of the record, we find that defendants have not met their burden of proving that plaintiff failed to make reasonable efforts to mitigate damages. The record shows that plaintiff was required to remedy the contamination before it was able to close the sale of its property, and plaintiff's expert testified that soil removal and disposal was the remedial method that best suited plaintiff's needs.

Defendants further argue that the trial court abused its discretion in denying their motion for remittitur because the jury's verdict was excessive. We disagree. Alf Bloch testified that the cost of cleanup was $24,990. The cost of the phase II inspection was $8,570 according to Kruszewski, and approximately $9,500 according to Bloch. Gary Lipton testified that the proceeds of the auction of plaintiff's machinery would have been 20 to 30% higher if it had not been delayed by the environmental contamination. Because the jury's damages award of $29,590 fell within the range of evidence presented, the trial court did not abuse its discretion in denying defendants' motion for remittitur. See *Hines v Grand Trunk and Western Railroad Co,* 151 Mich App 585, 594-595; 391 NW2d 750 (1985).

Defendants next argue that the trial court abused its discretion in denying their motion for a new trial because there was no evidence that defendants were the source of the contamination on plaintiff's property and, therefore, the jury's verdict was against the great weight of the evidence. Once again, we disagree. This Court reviews a trial court's grant or denial of a motion for a new trial for an abuse of discretion. *Phinney, supra* at 525. The trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Id.* This Court gives substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id.* As discussed above, the evidence supported an inference that the source of the contamination was the staining from the motor oil storage tanks on defendants' property. Therefore, the trial court did not abuse its discretion in denying defendants' motion for a new trial because the overwhelming weight of the evidence does not favor defendants.

Finally, defendants argue that the trial court abused its discretion in denying their motion for a new trial because the jury's verdicts were inconsistent. The jury was given a special verdict form for each of the four counts. After deliberation, the jury found defendants were liable on all four counts. On the special verdict form for the negligence claim, the jury indicated that plaintiff's total damages were $29,590. On the other three forms, the question concerning damages was left blank. Defendants contend that the verdicts were legally and logically inconsistent because the jury found that defendants were liable on all four counts but awarded damages on only one count.

The general rule is that where a verdict in a civil case is inconsistent and contradictory, it will be set aside, and a new trial will be granted. *Lagalo v Allied Corp,* 218 Mich App 490, 492; 554 NW2d 352 (1996). However, it is fundamental that every attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. [*Granger v Fruehauf Corp,* 429 Mich 1, 9; 412 NW2d 199 (1987).] If there is an

interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent. *Lagalo, supra* at 493.

In the present case, this Court finds that the jury's verdicts were not so logically and legally inconsistent that they cannot be reconciled. It is reasonable that the jury found defendants liable on all four counts but chose to award plaintiff's damages in a single amount rather than to apportion it among the three counts, particularly in light of the fact that all four counts arose from the same facts. Also, defense counsel's statements on the record reflect his understanding that the highest award for any one claim would be "the sole award" and that any damages awarded for more than one of the claims would not be aggregated into one sizable award. Therefore, the trial court did not abuse its discretion in denying defendants' motion for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan

[1] MERA, MCL 299.601 *et seq.;* MCL 13.32(1) *et seq*., was repealed pursuant to 1994 PA 451, effective March 30, 1995. It has been substantially revised and republished at MCL 324.20101 *et seq.;* MSA 13A.20101 *et seq*. Notably, MERA, the original statute, was no longer in effect at the time of trial, but it was in effect when plaintiff filed its complaint for contribution on June 14, 1993. Although neither party addresses this fact, we will review this case under the statutory provisions prior to their repeal and revision in 1995.

[2] MCL 299.612; MSA 13.32(12) was repealed by 1994 PA 451, effective March 30, 1995. The new section that repealed this statute is found at MCL 324.20126; MSA 13A.20126. MCL 324.20126; MSA 13A.20126 states in pertinent part, as did MCL 299.612; MSA 13.32(12), that

> the following persons are liable under this part [for response activity costs]:
>
> (a) The owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release. . . .

MCL 324.20126a(1)(a); MSA 13A.20126a(1)(a) also states that a person liable under §20126 is jointly and severally liable for "[a]ll costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this part."