HAYES v. NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE

2022 OK CIV APP 20
Case Number: 118868
Decided: 07/23/2021
Mandate Issued: 06/02/2022
DIVISION I
THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION I

Cite as: 2022 OK CIV APP 20, __ P.3d __

MACK COY HAYES, OKEOZARK WINE, LLC, an Oklahoma Limited Liability Company, ROY DALE KELLY, and DAN J. CAGLE and VIRGINIA KAREN FAUDI, Co-Trustees of the JOHN WILLIAM CAGLE AND MAXINE CAGLE REVOCABLE TRUST DATED APRIL 19, 2005, Plaintiffs/Appellants,

v.

NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE, INC., and NORTHEAST RURAL SERVICES, INC., Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT OF
MAYES COUNTY, OKLAHOMA

HONORABLE SHAWN TAYLOR, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED FOR A NEW TRIAL

Johnny G. Beech, Courtney D. Powell, Oklahoma City, Oklahoma, Charles B. Cowherd, Derek A. Ankrom, SPENCER FANE LLP, Springfield, Missouri, for Plaintiffs/Appellants,

Richard E. Hornbeck, Lane M. Claussen, HORNBECK VITALI & BRAUN, P.L.L.C., Oklahoma City, Oklahoma, for Defendants/Appellees.

THOMAS E. PRINCE, JUDGE:

¶1 This case concerns alleged damages to trees, vines, hay and crops. Plaintiffs/Appellants, Mack Coy Hayes, OkeOzark Wine, LLC, Roy Dale Kelly, and Co-Trustees of the Cagle Revocable Trust ("Plaintiffs"), appeal judgments rendered in favor of Defendants/Appellees, Northeast Oklahoma Electric Cooperative, Inc. and Northeast Rural Services, Inc. ("Defendants" or "NEOEC" and "NRS"). Plaintiffs alleged that their property was damaged and profits were lost as a result of Defendants' trespassing and negligence. NEOEC is a not-for-profit cooperative and NRS is a subsidiary of NEOEC. In order to protect their equipment, Defendants must cut, trim, or use pesticides to kill trees and brush that could damage their power lines. During September of 2014, Defendants sprayed herbicide on or near Plaintiffs' land in order to maintain their power line rights of way. Plaintiffs averred that when Defendants sprayed the herbicide, they did so negligently and allowed the herbicide to drift onto Plaintiffs' property. Plaintiffs further alleged that their property was damaged or destroyed as a proximate cause of Defendants' actions.

¶2 Prior to trial, the trial court granted summary judgment in favor of NRS. During trial, the trial court granted a directed verdict dismissing OkeOzark's claim for damages. After approximately twelve days of trial, a jury rendered a verdict in favor of NEOEC. Plaintiffs filed a motion for new trial which was denied. Defendants were awarded attorney's fees and costs in the amount of $375,192.25. We find that the trial court committed error by admitting into evidence the ODA Reports that

constituted inadmissible hearsay. As a result, we reverse the decision granting summary judgment to NRS. We affirm the directed verdict against OkeOzark. We vacate the jury verdict in favor of NEOEC, and we vacate the award of attorney fees and costs in the amount of $375,192.25. Regarding the jury instructions, we find that it was error for the trial court to refuse to provide a separate verdict form on the theory of ultrahazardous or abnormal activity, but not error to refuse a verdict form with respect to wrongful injury to timber or to instruct on the theory of *res ipsa loquitur*. The matter is remanded to the trial court for a new trial.

BACKGROUND

¶3 On September 3, 5, 9, and 10, 2014, Tyson Hessee, an employee of NEOEC, sprayed chemicals in an area adjacent to Plaintiffs' property in order to maintain Defendants' power line rights of way. The chemicals applied by Mr. Hessee were a mixture of Tordon K, Garlon 3 A, and Milestone. The active ingredients that could have damaged Plaintiffs' property were picloram and triclopyr. Plaintiffs own a total of approximately 230 acres of land. Mack Coy Hayes owns approximately 160 acres and leased another 50 acres from the Cagle Trust. On that land Mr. Hayes had an orchard and a vineyard that covered approximately 15 acres. Other land in his possession was utilized for hay and pasture land. During September of 2014, Mr. Hayes noticed a change in his vineyard. After discovering that the electric cooperative applied chemicals nearby, Mr. Hayes called NEOEC on September 10, 2014, to complain. On September 12, 2014, Mr. Hayes made a complaint to the Oklahoma Department of Agriculture ("ODA"). The Department of Agriculture investigated the complaint and collected samples from Mr. Hayes's property on September 16, 2014.

¶4 Mr. Hayes initially filed a lawsuit in federal court during October of 2014, but he dismissed that lawsuit approximately two weeks later. The Cagle Trust and Roy Dale Kelly subsequently made complaints to the ODA and the ODA collected samples from their land during November or December of 2014.

¶5 Plaintiffs filed the instant action on August 24, 2016. In their Petition, Plaintiffs claimed that Defendants did not apply the chemicals properly and, as a result, the chemicals drifted onto Plaintiffs' land and destroyed their property. Plaintiffs alleged that they lost trees, vines, hay and crops as a direct result of Defendants' negligent behavior and trespass. Hayes asserted that his entire vineyard had to be replaced as a result of Defendants' actions.

¶6 On September 20, 2017, NRS filed a Motion for Summary Judgment and claimed that it owed no duty to Plaintiffs and, therefore, that NRS arguably should be awarded summary judgment. NRS claimed that it was not involved with the application of chemicals to the rights of way near Plaintiffs' property during September of 2014. NRS alleged that Tyson Hessee was an employee of NEOEC. According to NRS, NEOEC performed its own herbicide applications during 2014. As a result, NRS argued that it should be granted summary judgment as a matter of law.

¶7 Plaintiffs responded and alleged that NRS is a subsidiary of NEOEC. NRS had a contract with NEOEC, which provided that NRS agreed to "furnish all labor, tools, transportation, and equipment necessary" to conduct foliar applications during 2014. In addition, all of the herbicide application equipment used in the spraying incident was owned, maintained, and stored by NRS. Mr. Hessee completed his "Job Briefing Check List" on NRS forms and letterhead. Mr. Hessee was under direction to report to NRS in the event of a problem or emergency. Mr. Hessee's safety director was an employee of both NEOEC and NRS. Plaintiffs alleged that there was substantial evidence of a joint venture between NEOEC and NRS and that, at a minimum, there was a genuine issue of fact as to whether NRS was involved in a joint venture. The trial court granted summary judgment in favor of NRS.

¶8 Prior to trial, Plaintiffs filed a motion in limine seeking to exclude from evidence the results of laboratory tests conducted by the ODA (i.e., labeled as "Pesticide Analysis Report[s]" by the "Oklahoma Department of Agriculture, Food & Forestry." R. at 1746-1758. ("ODA Reports"). The samples collected by the Department of Agriculture from Plaintiffs' property during 2014, were tested and the test results indicated that there were no chemicals present on Plaintiffs' property. Defendants' Ex.'s D7-39, D7-41, D7-43, D7-45, D48-21 & D49-24. The ODA Reports specifically concluded that "no residue [had been] detected". Consequently the ODA reports refuted the claims of the Appellants that herbicides applied by the Defendants damaged their properties.

¶9 Defendants claimed that the ODA Reports were self-authenticating under 12 O.S. §2901(B)(7). Defendants further claimed that three witnesses would be available at trial to testify regarding the ODA Reports. Steven Moser was the individual that performed the testing on the samples collected during September of 2014. Another individual, Emily Curry, tested the samples

that were subsequently obtained as a result of complaints made by Mr. Kelly and the Cagle Trust. Michael Vandeventer was the Program Administrator who could interpret the ODA Reports and testify regarding the testing process. However, Mr. Vandeventer was not involved with the testing. Kenneth Newton was the individual who collected the samples but he also was not involved with the testing process.

¶10 Mr. Moser passed away before trial commenced. The trial court ruled that the ODA Reports could be admitted into evidence as long as Tanna Hartington, Mr. Moser's replacement, would testify that the ODA Reports were a "business record of the Department of Agriculture." September 16, 2019 Tr. at 358-360 & 417-420. Appellants argue on appeal that it was error for the trial court to admit the ODA Reports into evidence because they constitute hearsay.

¶11 After presentation of all of the evidence, Defendants sought a directed verdict against OkeOzark Winery. OkeOzark was a winery owned by Mack Coy Hayes's girlfriend, Ausline Palmer. The winery did not have any ownership interest in the vineyard located on Mr. Hayes's land. However, Ms. Palmer testified that OkeOzark lost profits in the amount of $50,000.00 as a result of the damage to the vineyard. The trial court stated:

> There is a matter of housekeeping that I've addressed in chambers in regard to the demurrer to the evidence in regard to OkeOzark Winery. The Court has determined that that should be granted. My grounds for that were I determined that it would be a double recovery in regard to my understanding that OkeOzark is the winery and that the grapes that would be provided that might be damages would be those that Mack Hayes already has a claim in this case for.

¶12 The jury entered a verdict in favor of NEOEC. Plaintiffs filed a motion for new trial, which was denied by the trial court. The trial court awarded Defendants attorney fees and costs in the amount of $375,192.25. This appeal followed.

STANDARD OF REVIEW

¶13 This appeal involves issues stemming from the grant of summary judgment, a directed verdict, the admission of evidence purportedly as being excepted from the hearsay rule, both the issuance of and the refusal of certain jury instructions, a motion for new trial, and an award of attorney fees and costs. A trial court's grant of summary judgment is reviewed *de novo*. *In Re Estate of MacFarline*, 2000 OK 87, ¶3, 14 P.3d 551, 554-555. ("Although a trial court in making a decision on whether summary judgment is appropriate considers factual matters, the ultimate decision turns on purely legal determinations, i.e. whether one party is entitled to judgment as a matter of law because there are no material disputed factual questions.") *Carmichael v. Beller*, 1996 OK 48, ¶2, 914 P.2d 1051, 1053. ("*De novo* review requires an independent, non-deferential re-examination of another tribunal's record and findings.") *Patterson v. Beall*, 2000 OK 92, ¶7, 19 P.3d 839, 842.

¶14 The standard of review for directed verdicts is very similar to the standard for summary judgments. *Harder v. F.C. Clinton, Inc.*, 1997 OK 137, ¶6, 948 P.2d 298, 301-302. The standard of review for a directed verdict is *de novo*. *Cities Service Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶11, 980 P.2d 116, 124. To determine whether the evidence is sufficient for a directed verdict, the trial court must consider the evidence in the light most favorable to the non-moving party. *Estrada v. Port City Properties, Inc.*, 2007 OK CIV APP 23, ¶10, 158 P.3d 495, 499.

¶15 A trial court's determination regarding admission or rejection of evidence under one of the hearsay exceptions will not be disturbed absent an abuse of discretion. *Muratore v. State ex rel. Dept. of Public Safety*, 2014 OK 3, ¶6, 320 P.3d 1024, 1029. ("An abused judicial discretion is manifested when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence.") *Patel v. OMH Medical Center, Inc.*, 1999 OK 33, ¶20, 987 P.2d 1185, 1194.

¶16 Regarding jury instructions, in *Chartney v. City of Choctaw*, 2019 OK CIV APP 26, 441 P.3d 173, the Court stated:

> The test upon review of an instruction improperly given or refused is whether there is a probability that the jurors were misled and thereby reached a different result than they would have reached but for the error. *Woodall v. Chandler Material Co.*, 1986 OK 4, ¶13, 716 P.2d 652. Moreover, 20 O.S. §3001.1 provides that a judgment will not be set aside unless the appellate court finds the error probably resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right. *See Messler v. Simmons Gun Specialties, Inc.*, 1984 OK 35, ¶25, 687 P.2d 121. Similarly, 12 O.S. §78 requires appellate courts to disregard harmless error in the giving of jury instructions which does not affect the substantial rights of a party. 12 O.S. §78. *See also Sunray DX Oil Co. v. Brown*, 1970 OK 183, ¶21, 477 P.2d 67.

Id at 176. When reviewing assigned error in jury instructions, the Court must consider the instructions as a whole and determine whether the instructions reflect Oklahoma law on the relevant issue, not whether the instructions were perfect. *Nealis v. Baird*, 1999 OK 98, ¶15, 996 P.2d 438. However, the question of whether a case is "fit for the application for the application of *res ipsa loquitur*" is a question of law. *Qualls v. U.S. Elevator Corp.*, 1993 OK 135, ¶7, 863 P.2d 457, 460.

¶17 Abuse of discretion is the applicable standard of review when a trial court denies a motion for new trial. *Jones, Givens, Gotcher & Bogan, P.C. v. Berger*, 2002 OK 31, ¶5, 46 P.3d 698, 701. ("Although a trial court is vested with wide discretion in denying a new trial, its order will be reversed if the trial court is deemed to have erred with respect to a pure, simple and unmixed question of law.") *Id* at 701.

¶18 Defendants sought attorney fees and costs pursuant to 12 O.S. §928, §929, §940, §942, and 23 O.S. §72(B). The question of whether Defendants are entitled to an award of attorney fees is a question of law and is reviewed *de novo*. *Hall v. Dearmon*, 2015 OK CIV APP 40, ¶11, 348 P.3d 1107, 1109. However, the amount of the attorney fee award set by the trial court is reviewed for abuse of discretion. *Id* at 1109. The trial court has no discretion in determining whether a particular type of cost set forth in 12 O.S. §942 should be allowed, but it does have discretion to determine the amount of costs awarded. *Atchley v.Hewes*, 1998 OK CIV APP 143, ¶6, 965 P.2d 1012, 1014.

ANALYSIS

ODA Reports

¶19 The trial court allowed ODA Reports to be admitted into evidence over the Plaintiffs' continuing objection. It is undisputed that the ODA Reports were hearsay. Defendants claim that the results were admissible because 12 O.S. §2803(8) provides an exception for "a record of a public office or agency setting forth its regularly conducted and regularly recorded activities or matters observed pursuant to duty imposed by law" where there is a duty to report. However, 12 O.S. §2803(8)(d), is an exception to the public records exception to the hearsay rule. Title 12 O.S. §2803(8)(d), states that the following is not within the exception to the hearsay rule:

> d. factual findings resulting from special investigation of a particular complaint, case or incident [1]

Defendants argue that there was nothing "special" about the investigation conducted by the ODA since the ODA routinely investigates all complaints it receives. We disagree. The Oklahoma statute, 12 O.S. §2803(8)(d), differs from the corresponding Federal Rules of Evidence 28 U.S.C. Rule 803(8). The federal rule does not contain an exclusion like the one set forth in 12 O.S. §2803(8)(d). The ODA went to Plaintiffs' land to collect samples because Plaintiffs made specific complaints about the alleged herbicide drift during 2014.

¶20 A similar hearsay issue was addressed by the Court of Appeals of Arkansas in *McCorkle Farms, Inc. v. Thompson*, 84 S.W.3d 884 (Ark. App. 2002), where a corporate cotton farmer sued a corporate rice farmer and crop duster for damages sustained when the cotton farmer's crop was allegedly exposed to pesticide applied to the rice farmer's nearby land. *Id* at 886. The cotton farmer reported symptoms of exposure to pesticides to the Arkansas State Plant Board. The Plant Board investigated complaints from the cotton farmer and others involving the same incident and held a hearing. The Plant Board concluded that there was not sufficient evidence to indicate that the rice farmer and the crop duster were responsible for damages. *Id* at 887. A jury returned a defense verdict. *Id.*, at 886. On appeal, the cotton farmer claimed that the trial court erred in allowing the introduction of the conclusions of the Plant Board Pesticide Committee into evidence. *Id* at 888. The Arkansas Court pointed out that "[a]t common law, a judgment from another case would not be admitted . . ." into evidence and also stated that:

> **A practical reason for denying a judgment or administrative agency report evidentiary effect is the difficulty of weighing a judgment or report**, considered as evidence, against whatever contrary evidence a party to the current suit might want to present. **The difficulty must be especially great for a jury, which is apt to give exaggerated weight to an official finding of a state body**.

Id at 888 (emphasis added). As in this case, the Defendants in *McCorkle* argued that since the Plant Board is an administrative agency authorized to conduct investigations, the investigation of the application of the pesticide is within the hearsay exception. *Id.* at 889. However, Arkansas, like Oklahoma, has statutory language providing that special investigations of particular complaints, cases, or incidents are not within the hearsay exception for public records. *Id* at 889. The Court in *McCorkle* provided the following illustration to demonstrate the basis for its holding that the report at issue there stemmed from a "special investigation" and was not within the hearsay exception for a "regularly conducted and . . . recorded . . ." activity of a public office:

> This distinction may be illustrated by the example of a public agency charged with monitoring water quality in the state's rivers. If the agency, in fulfillment of its routine duties, tests the water in a flooding river (*i.e.,* resulting from a particular incident, namely, the flood), the factual findings of those tests would be admissible in a civil trial as within the public records or reports exception to the hearsay rule. **If, however, the agency conducts an investigation in response to a complaint that someone is dumping material into a river, the factual results of that investigative report would be inadmissible pursuant to Rule 803(8)(iv)**. (citation omitted).

Id. at 889 (emphasis added). Therefore, the conclusions reached by the Plant Board were found in *McCorkle* to be inadmissible.[2]

¶21 Defendant relies on three cases for the proposition that the ODA reports were admissible as an exception to the hearsay rule pursuant to 12 O.S. §2803(8). In *Hadley v. Ross*, 1944 OK 366, 154 P.2d 939, the Court reversed a trial court that had allowed into evidence a report of a car accident created by a highway patrolman. *Id* at 942-943. *Hadley* was decided prior to the passage of the current statute but the result reached by the Court would be the same today under 12 O.S. §2803(8)(a), which states that "investigative reports by police and other law enforcement personnel" are not within the exception to the hearsay rule.

¶22 *Clark v. State ex rel. Dept. of Public Safety*, 2007 OK CIV APP 12, 153 P.3d 77, involved the constitutionality of a highway roadblock-type checkpoint. Bradley Clark was stopped and arrested for driving under the influence of an intoxicating beverage. *Id* at 78. The trial court allowed into evidence the "Log of Tests and Maintenance Record" for the breathalyzer used by the officer in administering the blood-alcohol test. *Id* at 79. The Court determined that the test log was admissible pursuant to 12 O.S. §2803(8) because the maintenance of the breathalyzer was performed as required by law. *Id* at 82-83. *Clark* is distinguishable from the instant matter because it did not involve a special investigation as a result of a particular complaint and the officer who arrested Clark did testify at trial regarding his personal observations and reliance on the test log prior to administering the breathalyzer test. *Id* at 79.

¶23 In *State ex rel. Fisher v. Heritage National Insurance Co.*, 2006 OK CIV APP 119, 146 P.3d 815, the appellant ("MCA") raised a hearsay objection on appeal after the trial court allowed into evidence the Report of Financial Examination for the Oklahoma Insurance Department. *Id* at 818. The Court affirmed. The report was generated as a result of routine examinations of insurance companies as the Commissioner deems appropriate, but at least once every three years. *Id* at 818. The Court noted that the examiner's testimony was available and that neither party disputed the report's conclusion that MCA was overpaid. *Id* at 819. Finally, the Court stated that "even if this evidence was improperly admitted, we find no prejudice." *Id* at 819. The results contained in the ODA reports in this matter were hotly contested by the Plaintiffs and the ODA reports were generated solely as a result of particular complaints made by the Plaintiffs.

¶24 The complaints in this case that were made by Mack Coy Hayes, Roy Dale Kelly, and the Cagle Trust to the ODA were particular complaints. The investigations conducted by the ODA, in response to the complaints, were special investigations of particular complaints and, therefore, not excepted from the hearsay rule. The ODA reports were highly prejudicial to Plaintiffs' case because they purportedly indicated that there was no herbicide detected on Plaintiffs' property after Defendants sprayed their chemicals. The factual findings contained in the reports that were created as a result of those special investigations are not admissible pursuant to 12 O.S. §2803(8)(d). It was a clear abuse of discretion for the trial court to admit the reports into evidence. We hold that the trial court also abused its discretion when it did not grant Plaintiffs a new trial.

Summary Judgment to NRS

¶25 The trial court granted the Motion for Summary Judgment filed by NRS. In the motion, NRS claimed that it did not apply the herbicides near Plaintiffs' land during September of 2014. Consequently, NRS asserted that it did not owe a duty to Plaintiffs since it was not involved with the spraying of herbicides. The following facts were undisputed by the parties:

1. NRS is a subsidiary of NEOEC.

2. A contract between NRS and NEOEC provided that NRS would "furnish all labor, tools, transportation, and equipment necessary" to conduct foliar applications during 2014.

3. All of the herbicide application equipment used in the spraying incident was owned, maintained, and stored by NRS.

4. Tyson Hessee, the herbicide applicator, completed his "Job Briefing Check List" on NRS forms and letterhead.

5. Mr. Hessee was under direction to report to NRS in the event of a problem or emergency and Mr. Hessee's safety director was an employee of both NEOEC and NRS.

NRS claimed that even though there was a contract for it to conduct foliar applications for NEOEC during 2014, it did not apply herbicides for NEOEC that year because of contractual obligations with other companies.

¶26 Summary judgment is appropriate when there are no material disputed factual questions and a party is entitled to a judgment as a matter of law. *Prudential Insurance Co. v. Glass*, 1998 OK 52, ¶2, 959 P.2d 586, 588. A summary judgment ruling must be made on the record presented by the litigants, not on a potentially possible record. *Id* at 588. If there are either controverted material facts, or if reasonable minds might reach different conclusions even if material facts are undisputed, summary judgment should be denied. *Id* at 588. In addition, all inferences and conclusions to be drawn from the evidentiary materials presented, must be viewed in a light most favorable to the nonmoving party. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, ¶7, 408 P.3d 183, 187-188.

¶27 The Court has reviewed the facts and evidentiary material presented by the parties. NRS and NEOEC are so closely-related that there exists, at the very least, a question of fact as to whether NRS could be liable to the Plaintiffs as a result of the application of herbicide on or near Plaintiffs' property. We hold that it was error for the trial court to grant summary judgment to NRS.

Instructions Given

¶28 Plaintiffs contend that jury instructions given by the trial court and proposed instructions not given were error. First, Plaintiffs claim that Instruction No. 14 misstated the law regarding the permissible use of express easements.[3] Instruction No. 14 stated:

> An easement is the right of one entity to go onto the land of another and make a limited use thereof. The owner of an easement may utilize the land upon which the easement exists, in such a manner that is necessary to carry out the intended purpose of the easement. If you find that Defendant had a valid easement to enter upon Plaintiffs' property then Defendant has the right to take action consistent with the intended purpose of the easement.

Plaintiffs argue that Instruction No. 14 was confusing, misleading, and misstated the law regarding the rights conveyed by an easement. Plaintiffs state that the trial court should have instructed the jury that the express language of an easement controls its scope.

¶29 In *Logan County Conservation District v. Pleasant Oaks Homeowners Association*, 2016 OK 65, 374 P.3d 755, the Court stated that: "The owner of an easement may utilize the servient estate in such a manner that is reasonably necessary to carry out the servitude's intended purposes and to allow enjoyment of the rights bestowed by the easement." *Id* at ¶14. Although the trial court could have included language in the jury instruction stating that the plain language of the easement controls the intent of the parties to the easement, our review is limited to whether erroneous jury instructions probably resulted in a

miscarriage of justice, not whether the instructions are perfect. *Nealis v. Baird*, 1999 OK 98, ¶15, 996 P.2d 438. We have reviewed the instructions as a whole and find that Instruction No. 14 did not create a miscarriage of justice. There was no error.

¶30 Next, Plaintiffs aver that Instruction No. 16 was improper because it misstated the law by failing to advise the jury that herbicide drift causing damage to property constituted trespass. Instruction No. 16 stated:

> If herbicide used on a person's own land, or land the person has the right to be on, escapes and damages the land of another, it may constitute trespass.

Plaintiffs rely on *Young v. Darter*, 1961 OK 142, 363 P.2d 829, for the proposition that if herbicide drifted onto Plaintiffs' land, that necessarily constitutes trespass. We have reviewed the jury instructions as a whole and find that this instruction was proper and did not result in a miscarriage of justice. If the jury believed that the herbicide damaged Plaintiffs' property, this instruction clearly gave the jury the ability to find for the Plaintiffs on the basis of trespass.

Instructions refused

¶31 Plaintiffs assert that it was error for the trial court to refuse to submit a separate verdict form to address the ultrahazardous activity issue. Instruction No. 29 stated:

> Applying herbicide is an ultrahazardous activity. A person who engages in an ultrahazardous activity is responsible for all damage to property and injuries to persons that are directly caused by the activity.

The fact that this instruction was given to the jury shows that the trial court determined, as a matter of law, that "[a]pplying herbicide is an ultrahazardous activity".[4] However, the trial court did not treat the allegation of strict liability (based on an allegation of ultrahazardous activities) as a separate claim for relief. For purposes of the legal theory or framework of the case, the Pretrial Conference Order identified three alleged claims for relief: i.e., negligence, trespass and wrongful injuries to timber. Rd. at 1095. Under the heading of "Negligence", the Pretrial Conference Order shows that the Plaintiffs also asserted a claim of strict liability, citing the following authority: "OUJI 13.1 (strict liability). . . ."[5] Consequently, based on the language of the Pretrial Conference Order, the Plaintiffs identified that they were asserting a claim of strict liability (based on the alleged ultrahazardous activity) separate and apart from their negligence claim. This claim for relief was captured by the trial court Jury Instructions 29 & 30. In fact, the trial court instructed the jury on three claims for relief: i.e., trespass (i.e., Instructions 13-21); negligence (i.e., Instructions 22-28); and, strict liability (based on allegations of ultrahazardous activities) (i.e., Instructions 29-30). Rd. at 2399-2440. On the other hand, the Verdict Forms only allowed the jury to address two of the claims for relief: i.e., negligence and trespass. Rd. at 2372-2383.

¶32 The OUJI Committee Notes for OUJI 13.1, instruct as follows on how to treat an allegation of strict liability (based on an allegation of ultrahazardous activities):

> The Committee recommends that the contents of this Instruction should be incorporated into the Instruction on the Issues in the Case (Instruction Nos. 2.1, 2.2, or 2.3) rather than given as a separate Instruction. Appropriate instructions for damages should also be given. See Instruction Nos. 4.1, 4.2. In addition, **where causation is in issue, the appropriate instructions on causation should be given, but they should be modified by replacing references to negligence with references to the defendant's activities**. See Instruction Nos. 9.6-9.8.

(emphasis added).

¶33 Separate verdict forms are required, however, when an action is tried to a jury on two or more separate causes of action. *Quarles v. Panchal,* 2011 OK 13, ¶ 5, 250 P.3d 320, 322. *See Davon Oil Co. v. Steele,* 1940 OK 27, 98 P.2d 618, 621 ('where a cause consisting of two or more separate causes of action is tried to a jury, separate forms of a verdict for the separate causes of action should be submitted to the jury, and separate verdicts should be returned."). In *LPCX Corp. v. Faulkner*, 1991 OK 46, 818 P.2d 431, the Court stated, in part, that:

> **Where a cause consisting of two or more separate causes of action is tried to a jury separate verdict forms for each cause of action should be submitted to the jury**. *Stephens v. Draper,* 350 P.2d 506 (Okl.1960). From an early time however this Court has held that the failure of the defendant to object to a general verdict on separate causes of action is deemed a waiver of the objection to the general form of the verdict. *Stakis v. Dimitroff,* 154 Okl. 9, 6 P.2d 1053 (1932). The guiding precept applicable here, is separate forms for verdicts should be submitted to the jury and returned by them.

Id., at 440-441 (emphasis added). *Cf.*, Okla. Const. Art. 7, §21 ("In all jury trials, the jury shall render a general verdict."); *See also In re A.F.K.,* 2014 OK CIV APP 6, 317 P.3d 221, 225 ("Separate verdict forms are appropriate when an action is tried to a jury on two or more separate causes of action. (citation omitted).")[6].

¶34 In a technical sense, a claim for relief of strict liability (based on an allegation of ultrahazardous activities) is not the same as a claim of negligence. The difference between a claim of strict liability claim (based on an allegation of ultrahazardous activities) and a claim of negligence is that fault is not a necessary element of recovery on a claim of strict liability. *See Kirkland v. General Motors Corporation*, 1974 OK 52, ¶40, 521 P.2d 1353, 1365 ("The Restatement of the Law, Torts 2nd, § 402A, comment m, states that the strict liability stated therein is more in the nature of common law strict liability for possessors of dangerous animals or conduct of ultrahazardous activities, and does not rest on negligence. It is, therefore, strict in the sense that negligence is not a necessary element for recovery."). The terms "negligence" and "ordinary care" are defined in OUJI 9.2 as follows:

> 'Negligence' is the failure to exercise ordinary care to avoid injury to another's person or property. 'Ordinary care' is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide. Thus, under the facts in evidence in this case, **if a party failed to do something which a reasonably careful person would do, or did something which a reasonably careful person would not do, such party would be negligent**.

(emphasis added). In *Davis v. the City of Tulsa*, 2004 OK CIV APP 28, 87 P.3d 1106, the Court indicated that it previously cited with approval the Restatement (Second) of Torts §519 and §520. *Id* at footnote 4. In *Taylor v. Hesser*, 1998 OK CIV APP 151, 991 P.2d 35, the plaintiff suffered an injury to his eye while involved in a paintball game. *Id* at 36. The plaintiff there argued on appeal that the trial court erred in finding that paintball is not an ultrahazardous activity. The Court stated that a party conducting an ultrahazardous activity is liable for damages regardless of fault. *Id* at 39.[7]

¶35 As shown by Instructions 29 & 30 here, the allegation that the Appellees engaged in ultrahazardous activities was instructed as a separate cause of action. It was, therefore, error for the trial court to refuse to provide a separate verdict form which would have allowed the jury to find Defendant strictly liable for engaging in an ultrahazardous activity. On remand, in the event Instructions 29 & 30 are given upon the re-trial of this matter, appropriate verdict forms regarding this claim must also be given.

¶36 Plaintiffs also argue that it was error for the trial court to fail to submit wrongful injury to timber as a theory of recovery separate from negligence and trespass. Plaintiffs rely on 23 O.S. §72 in support of their proposition. Title 23 O.S. §72 is a statute that addresses the amount of damages that may be awarded for wrongful injury to timber. Clearly, wrongful injury to timber is not a separate claim for relief, but merely an element and measure of damages. As shown by Jury Instructions 13-21, the jury was not instructed that wrongful injury to timber was a separate claim for relief. The wrongful injury to timber instructions were integrated in the instructions on trespass. We review jury instructions to determine whether the instructions given probably resulted in a miscarriage of justice. *Nealis v. Baird*, 1999 OK 98, ¶15, 996 P.2d 438. We have reviewed the instructions as a whole and find that if the jury believed that Defendant's actions caused damage to Plaintiffs' timber, it could have rendered a verdict in favor of the Plaintiffs. There was no error as a result of the trial court's omission of a verdict form based on wrongful injury to timber.

¶37 Plaintiffs claim that the failure of the trial court to instruct the jury regarding *res ipsa loquitur* constitutes error. *Res Ipsa Loquitur* is "essentially a rule of circumstantial evidence where a jury in a negligence case is permitted, but not required, to draw an inference of negligence from the happening of an accident of a kind which experience has shown does not normally occur if due care is exercised." *Rogers v. Mercy Health Center, Inc.*, 2014 OK CIV APP 69, ¶24, 334 P.3d 426. The purpose of the *res ipsa loquitur* rule is to make out a prima facie case of negligence "in circumstances when direct proof of why the harm

happened is beyond the power or knowledge of the plaintiff." *Id* at 432. The foundational facts necessary to establish a claim for *res ipsa loquitur* are: (1) the Plaintiffs sustained injury, (2) the injury was proximately caused by an instrumentality solely within the control of the defendant, and (3) such injury does not normally occur under the circumstances absent negligence on the part of the defendant. *Id* at 432. In this matter Plaintiffs did not establish the foundational fact that a vineyard and orchard would not be damaged in the absence of Defendant's negligence. Defendant did not have exclusive control over land owned by Plaintiffs and there was evidence presented indicating that Mr. Hayes also used herbicide on his land. There was evidence presented at trial of a myriad of intervening causes that could have resulted in damage to Plaintiffs' land. We hold that, as a matter of law, the trial court did not commit error when it refused to include an instruction to the jury regarding *res ipsa loquitur*.

Directed Verdict Against OkeOzark

¶38 The trial court granted a directed verdict against OkeOzark. OkeOzark is the winery that used grapes produced by Mr. Hayes. OkeOzark had no ownership interest in the vineyard owned by Mr. Hayes. The trial court determined that if the winery was awarded damages, then it would constitute a double recovery since Mr. Hayes already had a claim for damages as a result of the loss of the same grapes. In order to establish a claim for negligence, the defendant must owe a duty of care to the plaintiff and plaintiff must be injured as a direct result of defendant's failure to properly perform that duty. *See Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶12, 160 P.3d 959. OkeOzark cannot make a claim for negligence as a result of damage to property it did not own. Defendant did not owe a duty of care to OkeOzark and OkeOzark was free, at all times, to conduct business with any owner of a vineyard to purchase grapes for the production of wine. The directed verdict against OkeOzark is affirmed.

Attorney Fee Award

¶39 Prior to trial, NRS was granted summary judgment. On April 5, 2019, NRS filed an Application for Assessment of Fees and Costs Against Plaintiffs. In the application NRS sought an award of attorney fees and costs in the amount of $279,346.07. Plaintiffs responded on April 22, 2019, and claimed that the attorney fee application was premature and that it improperly sought an award of fees to NEOEC. NRS and NEOEC were represented by the same attorneys.

¶40 On November 19, 2019, Defendants, NEOEC and NRS, filed a combined Application for Assessment of Fees and Costs Against Plaintiffs and Brief in Support. Defendants sought the award pursuant to 12 O.S. §696.4, §928, §929, §940, §942, and 23 O.S. §72(B), based on their prevailing party status. In that application Defendants sought an award of attorney fees and costs in the amount of $474,786.50.

¶41 On February 7, 2020, there was a hearing on Plaintiffs' Motion for New Trial and Defendants' Application for Attorney Fees and Costs. During the hearing the trial court stated:

> We have an attorney -- application for attorney fees by Northeastern Oklahoma Electric Cooperative after the 12 days of jury trial and there was a defendants' verdict.
>
> There was a previous attorney fee bill on behalf of another defendant, NRS, which was dismissed from the case. I can't remember if I did that or another judge did that, but we have the hearing, we have the testimony, and I've been advised by counsel that there's no reason to determine that because the attorney fee bill that's now pending includes any claim on behalf of NRS in regard to that.

The trial court held a hearing on the issue of attorney fees and costs and awarded Defendants attorney fees and costs in the amount of $375,192.25. We have reversed the order granting summary judgment NRS. We have also vacated the jury verdicts in favor of NEOEC. We, therefore, hold, that the award of attorney fees and costs should also be vacated because at this point in the litigation there is no prevailing party.

CONCLUSION

¶42 It was error for the trial court to admit the ODA reports into evidence and to grant summary judgment in favor of NRS. We reverse the award of summary judgment to NRS, we vacate the jury verdicts in favor of NEOEC, we vacate the award of attorney fees and costs in the amount of $375,192.25, and the matter is remanded for a new trial. It also was error for the trial

court to refuse to provide a separate verdict form on the theory of ultrahazardous or abnormal activity, but not error to refuse a verdict form with respect to wrongful injury to timber or to instruct on the theory of *res ipsa loquitur*.

GOREE, P.J., and MITCHELL, J., concur.

FOOTNOTES

THOMAS E. PRINCE, JUDGE:

[1] We note that a public record that is inadmissible under 12 O.S. §2803, paragraph 8 is also inadmissible under 12 O.S. §2803, paragraph 6.

[2] *See also Swart v. Town and County Home Center, Inc.*, Ark. App. 619 S.W.2d 680 (holding that a written report by a compliance officer which was generated after an anonymous complaint was inadmissible hearsay.) *Id* at 683. *See Janssen Pharmaceuticals, Inc. v. State*, 432 S.W.3d 563 (Ark. 2014)(a "Warning Letter" stemming from an investigation was not part of routine record keeping and, consequently, it was inadmissible.) *Id* at 574. *See Shexnayder v. Gish*, 948 So.2d 1259 (La.App. 2 Cir. 2007)(holding that a trial court committed error when it admitted a letter into evidence that set forth factual findings in regard to a specific inquiry.) *Id* at 1265. In *Kuhn v. Coldwell Banker Landmark, Inc.*, 245 P.3d 992 (Idaho 2010), the Supreme Court of Idaho held that if a special investigations report created for the Idaho real Estate Commission was not admissible, then testimony by a witness regarding the same would also be inadmissible. *Id* at 1004. In *Crockett v. City of Billings*, 761 P.2d 813 (Mont. 1988), the Supreme Court of Montana reviewed a statute that is identical to 12 O.S. §2803(8)(d), and concluded that a trial court erred when it admitted into evidence a reasonable cause finding of the Montana Human Rights Commission. *Id* at 820. Finally, in *Tiemann v. Santarelli Enterprises, Inc.*, 486 A.2d 126 (Me. 1984), the Supreme Judicial Court of Maine determined that the "Maine rule, unlike the federal rule, removes from the public records hearsay exception 'factual findings resulting from special investigation of a particular complaint, case or incident'" and, as a result, an investigative report prepared in response to a particular complaint was inadmissible hearsay. *Id* at 131.

[3] Defendant's requested Jury Instruction No. 33 stated: "An easement is the right of one person to go onto the land of another and make a limited use thereof. Easements may be expressly created by deed, contract, or come about by necessity or prescriptive use or may be implied from an instrument or document. The owner of an easement may utilize the servient estate, or estate upon which an easement exists, in such a manner that is reasonably necessary to carry out the intended purpose and to allow enjoyment of the rights bestowed by the easement. If you find that Defendant had a valid easement to enter Plaintiffs' property then Defendant has the right to take steps reasonable and necessary to maintain its power line on the Plaintiffs property, which includes spraying herbicide in order to keep trees and other vegetation from interfering with Defendant's power line or equipment.

[4] Whether the trial court committed error with respect to the finding that an ultrahazardous activity had occurred is not before this Court. In other words, because the Appellee did not file a counter-appeal, this Court will not analyze or determine whether it was proper for the trial court to give Instructions No. 29 & 30. *See May v. May*, 1979 OK 82, 596 P.2d 536, 540 *("*A party who does not take an appeal stands in a posture restricted to the defense of the relief granted below.").

[5] OUJI 13.1 is an instruction for "Ultrahazardous Activities."

[6] *See* 12 O.S. §587 ("The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.").

[7] The Court in *Davis v. the City of Tulsa,* 2004 OK CIV APP 28, 39, also set out the factors listed in the Restatement (Second) of Torts to consider when determining what constitutes an abnormally dangerous activity. Section 520 states:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Citationizer© Summary of Documents Citing This Document

Cite	Name	Level

None Found.

Citationizer: Table of Authority

Cite	Name	Level
Oklahoma Court of Civil Appeals Cases		
2004 OK CIV APP 28, 87 P.3d 1106,	DAVIS v. THE CITY OF TULSA	Discussed at Length
2006 OK CIV APP 119, 146 P.3d 815,	STATE ex rel. FISHER v. HERITAGE NATIONAL INSURANCE CO.	Discussed
2007 OK CIV APP 12, 153 P.3d 77,	CLARK v. STATE ex rel. DEPT. OF PUBLIC SAFETY	Discussed
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Cite	Name	Level
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2007 OK 38, 160 P.3d 959,	LOWERY v. ECHOSTAR SATELLITE CORP.	Discussed
2011 OK 13, 250 P.3d 320,	QUARLES v. PANCHAL	Discussed
2014 OK 3, 320 P.3d 1024,	MURATORE v. STATE ex rel. DEPT. OF PUBLIC SAFETY	Discussed
2016 OK 65, 374 P.3d 755,	LOGAN COUNTY CONSERVATION DISTRICT v. PLEASANT OAKS HOMEOWNERS ASSOCIATION	Discussed
1979 OK 82, 596 P.2d 536,	MAY v. MAY	Discussed
2017 OK 82, 408 P.3d 183,	BOYLE v. ASAP ENERGY, INC.	Discussed
1999 OK 98, 996 P.2d 438, 70 OBJ 3640,	Nealis v. Baird	Discussed at Length
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Title 12. Civil Procedure

Cite	Name	Level
12 O.S. 78,	Court to Disregard Insignificant Errors	Discussed
12 O.S. 587,	General or Special Verdict	Cited
12 O.S. 696.4,	Provision for Costs, Attorney Fees, and Interest	Cited
12 O.S. 942,	Costs the Court Judge May Award	Cited
12 O.S. 2803,	Hearsay Exceptions - Availability of Declarant Immaterial	Discussed at Length
12 O.S. 2901,	Requirement of Authentication or Identification	Cited

Title 20. Courts

Cite	Name	Level
20 O.S. 3001.1,	Setting Aside Judgment on Ground of Misdirection of Jury or Error in Pleading or Procedure	Cited

Title 23. Damages

Cite	Name	Level
23 O.S. 72,	Measure of Damages for Wrongful Injuries to Timber	Discussed at Length