

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA12-253

BETTY S. TAYLOR ET AL.
APPELLANTS

V.

TEXAS GAS TRANSMISSION, LLC
APPELLEE

OPINION DELIVERED NOVEMBER 7, 2012

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT
[NO. CV-2010-425]

HONORABLE THOMAS MORGAN
HUGHES III, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellants Joe G. Havlik, Karen A. Havlik, Betty S. Taylor, Scott V. Curd, and Kelly S. Curd appeal the December 9, 2011 judgment entered by the White County Circuit Court granting appellee Texas Gas Transmission, LLC's motion for summary judgment. Appellants argue that the trial court erred in ruling that they are not entitled to recover damages under either their breach-of-contract or mental-anguish claims. We affirm.

The basic facts of this case are undisputed. Appellants own adjoining tracts of land in White County, Arkansas. In 2008, appellee constructed a gas pipeline across appellants' lands. Prior to commencement of construction, appellants executed right-of-way agreements under which they granted permanent and temporary easements to appellee. Each agreement stated that if appellee caused actual damages to appellants' property outside the permanent and temporary easements, it would pay reasonable compensation for such damages caused by its routine maintenance and operation of the pipeline.

In August 2009, persons employed by appellee started repairing the pipeline where it crosses appellants' property. During the course of those repairs, appellee's contractors defecated, urinated, and threw garbage, including used toilet paper, rags, tee shirts, and other articles of clothing soiled with their feces, on appellants' property outside the permanent and temporary easements. Appellants contacted appellee and demanded that its contractors stop the aforementioned activity and to clean up the resulting mess.

Despite that demand, the conduct continued, and appellee did nothing to clean up the garbage and soiled debris left by its contractors. As a result, appellants cleaned up the mess themselves. After trying to resolve the issue informally, appellants filed suit and asserted claims for breach of contract and independent acts of negligence committed by appellee. They sought the value of the time that they spent picking up and removing the garbage and soiled articles thrown on their property by appellee's contractors and damages for the mental anguish resulting from the defilement of their land.

On June 8, 2011, appellee filed a motion for summary judgment in which it argued that appellants' claims should be dismissed because they did not sustain actual damages. The motion for summary judgment was argued before the trial court on September 1, 2011. At the conclusion of the hearing, the trial court ordered additional briefing on the following questions of law: (1) whether appellants' time is compensable when working on their own property; and (2) whether mental anguish is compensable as a result of alleged property damage. Supplemental briefs were filed by the parties, and on December 9, 2011, the trial court issued a judgment in which it ruled against appellants on these questions of law and

granted summary judgment to appellee. Appellants filed a timely notice of appeal on January 6, 2012.

Our standard of review is well settled in cases involving the grant of summary judgment:

In reviewing summary judgment cases, this court need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. The moving party always bears the burden of sustaining a motion for summary judgment. All proof must be viewed in the light most favorable to the resisting party, and any doubts must be resolved against the moving party. The moving party is entitled to summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof with proof showing a material issue of fact. However, if a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence.

Guy Maris Trust v. Truemper, 2012 Ark. App. 232, at 7, 405 S.W.3d 427, 431-32.

I. *Recovery of Reasonable Value of Cleanup Time*

At issue in this case is whether a landowner in Arkansas may recover the reasonable value of time he spends cleaning up waste wrongfully dumped on his property by another. The trial court granted appellee's motion for summary judgment, concluding that appellants sustained no recoverable damages under either the breach-of-contract claim or the negligence claims and that they failed to establish a cause of action for mental anguish.

Appellants argue that under Arkansas law, restoration costs are a recoverable element of damages for temporary damage done to property, *Kutait v. O'Roark*, 305 Ark. 538, 809

S.W.2d 371 (1991), and that restoration costs have been found to include removal of debris. See *Shamlin v. Shuffield*, 302 Ark. 164, 787 S.W.2d 687 (1990). They also note that Arkansas law provides that when injury to real property is temporary, the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury. *Fox v. Nally*, 34 Ark. App. 94, 805 S.W.2d 661 (1991). Appellants claim that this is what they attempted to recover—the cost of restoring their property to its prior condition.

Appellants offered evidence of the time they spent cleaning up “the filth” dumped on their lands by appellee’s contractors, and they now claim that appellee’s motion for summary judgment merely challenged their right to recover the reasonable value of their personal time as a matter of law. Appellants urge that this court should reverse the trial court and hold that landowners should be allowed to submit proof of the time they spent cleaning up their property as evidence to be considered by the jury in deciding the sum that it would take to restore the property to its former state. They maintain that the trial court erred in limiting clean-up costs to out-of-pocket expense.

We disagree. The relevant part of the agreements between the parties included the following language:

[I]n the event Grantee should cause actual damages to the property that are outside of the permanent and temporary workspace granted herein and depicted on Exhibit “A” [survey] Grantee agrees to pay Grantor reasonable compensation for such damages caused by Grantee’s initial construction of the pipeline(s) and appurtenant facilities on said property. Grantee further agrees that in the event Grantee should cause actual damages to the property after initial construction, Grantee will pay the Grantor or then current landowner reasonable compensation for such damages caused by Grantee’s routine maintenance and operation of the pipeline.

At the hearing on the motion for summary judgment, appellants never claimed a specific amount for their loss, and appellants do not claim any permanent damage to the property. Under the breach-of-contract claim, appellants had to prove actual damages, and no proof was provided. Additionally, although the complaint purported to claim negligence on the part of appellee, the actions complained of were actually intentional acts by the contractors. Counsel explained that the actions of the contractors were not within the scope of their employment.

Appellant Joe Havlik admitted that there was no permanent damage to his property from the trash and refuse left by the workers and that he had cleaned it up a short time thereafter. Appellant Karen Havlik expressed that she was equally repulsed by the contractors' using the land as a bathroom but was unable to provide evidence of the cost of her labor. Appellant Betty Taylor expressed concern about ruts left in the easement and testified that the contractors used the bathroom within 300 feet of her home. Mrs. Taylor claimed that she did not spend any money to fix anything appellee did wrong and acknowledged that there were no out-of-pocket expenses to clean up the trash.

This court has held that where harm is done to real property, damages may be either permanent or temporary. *Campbell v. Carter*, 93 Ark. App. 341, 219 S.W.3d 665 (2005). If damages are permanent or incapable of repair, the proper measure is the difference in market value before and after the injury, *see id.*, but when injury to real property is temporary, the measure of damages is the cost of restoring the property to the same condition that it was prior to the injury. *Fox, supra*.

Evidence indicates that appellee's contractors defecated and urinated on the real property belonging to appellants; however, this behavior was not in the scope of the contractor's employment and no evidence of costs of cleanup were presented by appellants. Appellants provided no evidence of permanent damage to their property; accordingly, we hold that the trial court did not err in granting appellee's motion for summary judgment regarding the entitlement to recovery for cleaning up their own property.

II. *Recovery of Damages for Mental Anguish*

Next, appellants challenge the trial court's ruling as a matter of law that a landowner may not recover damages for their mental anguish resulting from the defilement of their lands by appellee's contractors. At the hearing on its motion for summary judgment, appellee argued that appellants may not recover mental-anguish damages in a negligence action absent a physical injury. In its posttrial brief, appellants cited Arkansas law to support their claim that the physical-injury requirement does not apply to claims for temporary damage to real property. Notwithstanding this law, the trial court agreed with appellee and granted its motion for summary judgment on the issue of mental anguish.

Appellants cite *Felton Oil Co. v. Gee*, 357 Ark. 421, 182 S.W.3d 72 (2004), in which our supreme court held that damages for loss of the use and enjoyment of real property, fear and fright, loss of peace of mind, and disruption and inconvenience to quality of life can be recovered in a claim for negligence resulting in temporary damage to real property even if the plaintiff suffers no physical impact or injury to his person. The court based its decision on section 929 of the Restatement (Second) of Torts, which states that

- (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for
 - (a) the difference between the value of the land before the harm and the value of the land after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred;
 - (b) the loss of use of the land; and
 - (c) discomfort and annoyance to him as an occupant.

Restatement (Second) of Torts § 929 (1979). Appellants argue that, based on this holding, they have a legal right to recover similar damages from appellee and that the trial court erred in ruling otherwise.

Appellants assert that the trial court's statement that they filed a nuisance claim and its finding that the actions of the appellee's contractors were not committed in the course and scope of their employment with appellee reveal a fundamental misunderstanding of appellants' case. Appellants submit that they did not file a nuisance claim against appellee and do not seek mental-anguish damages under a nuisance theory. Moreover, appellants assert that they do not allege that appellee is vicariously liable for the actions of its contractors, rather that they sued appellee for its independent acts of negligence.

The burden of proof is always on the party asserting negligence, as negligence is never presumed. *Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004). To establish a prima facie case of negligence, appellants must show that they sustained damages, that appellee was negligent, and that such negligence was a proximate cause of their damages. *Id.* While a party may establish negligence by direct or circumstantial evidence, he cannot rely upon inferences based on conjecture or speculation. *Id.* Because appellants failed to establish any

damage resulting from the actions of appellee, we affirm the trial court's grant of summary judgment.

Affirmed.

GRUBER and GLOVER, JJ., agree.

Bowen Law Firm, PLLC, by: *Martin W. Bowen*, for appellants.

Hensley Law Firm, P.A., by: *James E. Hensley, Jr.*, for appellee.