IN THE COURT OF APPEALS OF IOWA

No. 1-366 / 10-1969
Filed June 29, 2011

MARILYN ZECH,
Plaintiff-Appellant,

vs.

KEITH L. KLEMME,
Defendant-Appellee.

Appeal from the Iowa District Court for Dickinson County, David A. Lester, Judge.

Marilyn Zech appeals from the district court order granting summary judgment on her negligence claim against Keith Klemme. **AFFIRMED.**

Gregg Larry Owens of Maahs & Owens, Spirit Lake, for appellant.

Ned Alan Stockdale of Fitzgibbons Law Firm, L.L.C., Estherville, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

Landowner Marilyn Zech appeals from the district court's denial of her motion to continue a summary judgment hearing to allow her additional time to secure an affidavit in resistance to the summary judgment motion. She also challenges the district court's grant of summary judgment on her negligence claim against neighboring property owner, Keith Klemme. Her suit alleged that Klemme's open burning caused fire damage to trees planted on her acreage. The district court concluded that Zech's motion to continue was untimely and therefore considered Klemme's motion for summary judgment without resistance from Zech. The district court granted Klemme summary judgment because Zech failed to establish a genuine issue of material fact regarding causation and damages. Zech argues the district court should have exercised its discretion to allow a continuance and that genuine issues of material fact exist regarding damages and proximate cause. Because it was within the district court's discretion to deny Zech's motion to continue and because Zech failed to establish a genuine issue of material fact relating to damages, we affirm the district court's rulings.

I. Background Facts

The incident giving rise to Zech's cause of action occurred on April 4, 2005, when strong winds allegedly rekindled an ember in a burn pile located on Klemme's property, and started a grass fire that damaged trees on Zech's property. In his affidavit, Klemme attests that on April 1 and 2, 2005, he burned brush and tree limbs in a burn pile located approximately 300 feet from the Zech

property. Klemme stated that he took the precaution of keeping a water hose nearby and used the hose to wet down the adjacent area to prevent the fire from spreading. He also had a cellular telephone available to contact the local fire department if necessary. Klemme stated he stopped burning at approximately 11 a.m. on April 2, 2005, and when he left his property at the end of the day, the burn pile had subsided to ashes. He worked on his property on April 3, 2005, and observed the burn pile throughout the day, noting no sign of any smoldering embers. Klemme also stated that he had no knowledge there would be any strong or sudden gusts of wind on April 4, 2005.

Klemme served Zech with a request for admissions on November 23, 2009. Zech filed no objections or responses within the time period set forth in Iowa Rule of Civil Procedure 1.510(2). Accordingly, the district court deemed the following facts conclusively established pursuant to Iowa Rule of Civil Procedure 1.511. Zech enrolled the land where the fire occurred in the federal Conservation Reserve Program (CRP). The CRP required Zech to prevent erosion and provide wildlife habitat on the acreage, and prohibited Zech from harvesting the trees or using the land for livestock or crop farming. In exchange for her enrollment in CRP, Zech received an annual payment of $1854 starting in 2002 and continuing through 2006. For conservation purposes, Zech and her late husband planted between 2000 and 3000 bare root seedling trees each year. At the time of the fire, approximately 62,500 trees of various species had been planted on the CRP land. The Zechs purchased the bare root seedlings from the Iowa State Forest Nursery at approximately twenty-five to thirty cents each.

Zech asserts that over 400 trees were damaged in the fire. In the ordinary course of nature, wildlife, insects, disease and climatic conditions have also damaged or destroyed some of the trees on the CRP land. Zech has not removed, replaced, treated, repaired, pruned, trimmed, or cut down any of the trees that have been damaged or destroyed by the fire or by natural causes. Zech does not live on the CRP property and the fire did not change her use of the land.

Zech contends the appearance of the burned branches on the trees she planted with her late husband has diminished her emotional enjoyment of the land. Zech does not argue the fire has diminished the fair market value of the land. The fire did not cause Zech to incur a loss of income, nor did it cause Zech to incur any additional expense. She also does not argue that the damaged trees had any historic value.

Zech has no personal knowledge as to the cause or origin of the fire. She does not contend Klemme acted intentionally to harm the trees.

II. Procedural Background

On February 3, 2006, Zech filed a petition against Klemme seeking compensatory damages based on his alleged negligence. After several continuances, the court scheduled trial for July 14, 2009. Klemme deposed Zech on April 8, 2009, and then filed a motion to determine the admissibility of evidence pursuant to Iowa Rule of Evidence 5.104(*a*). Klemme also filed a motion for summary judgment and the court scheduled a hearing on the motion

for May 18, 2009. On the day of the hearing, Zech dismissed her petition without prejudice.

On July 22, 2009, Zech filed her present claim and the court scheduled trial for April 20, 2010. Affidavits filed in the present case establish that on September 24, 2009, Klemme served Zech's counsel, by mail, with several discovery requests. When responses to the requests were not forthcoming, Klemme filed a motion to enlarge time to designate evidence. Klemme contacted Zech's counsel regarding the discovery requests and Zech's counsel stated he had not received them. Klemme's counsel then personally delivered the requests. The court granted Klemme's motion for an extension but did not set a new trial date.

On March 9, 2010, Klemme filed a motion for summary judgment, arguing that no genuine issue of material fact existed regarding either negligence or damages. The court set a hearing on the motion for April 9, 2010, but due to the unavailability of Klemme's counsel later moved the hearing to April 20, 2010. Zech deposed Klemme on March 18, 2010.

On the day of the April 20, 2010 hearing, Zech filed a motion to continue the summary judgment hearing. Zech cited the need for additional time to obtain an affidavit from Joseph Schwartz, the LeMars District Forester for the Iowa Department of Natural Resources who inspected the CRP land after the fire and provided information regarding the number of trees lost and the extent of the damage. Zech had been unable to reach Schwartz and surmised that Schwartz was away from his office on business. Zech asserted: "No resistance can be

made to the motion for summary judgment without Mr. Schwartz's testimony as he is the only person who investigated the loss associated with the fire shortly after the fire."

The April 20, 2010 hearing focused on Zech's request for more time. The court took Zech's motion to continue under advisement and informed the parties that if the motion was sustained, the court would grant Zech additional time to file a resistance to Klemme's motion for summary judgment and a hearing would be reset at a later date. The court further advised the parties that if the court denied Zech's motion to continue, Klemme's motion for summary judgment would be deemed submitted to the court for final ruling, without any resistance filed by Zech.

On April 21, 2010, Zech's counsel filed a supplemental affidavit pursuant to Iowa Rule of Civil Procedure 1.981(6), stating that Schwartz had contacted him and would provide an affidavit on April 27, 2010. On April 22, 2010, Klemme filed a motion to strike both Zech's motion for continuance and counsel's supplemental affidavit as untimely, prejudicial, and in violation of rule 1.981(3). On April 27, Zech filed a resistance to Klemme's motion to strike. The court did not rule on the motion to strike and Zech filed no affidavit from Schwartz.

On September 30, 2010, the district court denied Zech's motion to continue. The court held that Zech's motion to continue and supporting affidavit were untimely because they were beyond the fifteen-day time limit set forth in rule 1.981(3). The court also concluded that Zech did not establish good cause and that allowing a continuance when Zech failed to seek relief prior to the

scheduled hearing would prejudice Klemme. The court then considered the merits of the motion for summary judgment and determined that a genuine issue of material fact existed regarding Klemme's negligence, but that Zech had failed to present evidence of causation and damages to create disputed issues of fact on those elements. Therefore, the court sustained Klemme's motion for summary judgment.

On October 11, 2010, Zech filed a motion pursuant to rule 1.904 and a request for rehearing, which Klemme resisted. On October 27, 2010, the district court overruled Zech's motion and request for rehearing. Zech appeals.

III. Scope and Standard of Review

When a party opposing a motion for summary judgment files a motion requesting a continuance to permit discovery, our review is for abuse of discretion. *Bitner v. Ottumwa Cmty. Sch. Dist*., 549 N.W.2d 295, 302 (Iowa 1996). A nonmoving party should generally have a chance to complete discovery before the summary judgment hearing and the court's ruling on the motion. *Id.* But there is no requirement in rule 1.981 that summary judgment cannot be entered until all discovery is completed. *Id*. The failure to file an affidavit under rule 1.981(6) provides sufficient ground for the district court to reject the nonmoving party's claim that the opportunity for discovery was inadequate. *Id*.; *see also Good v. Tyson Foods, Inc*., 756 N.W.2d 42, 46 (Iowa Ct. App. 2008). The district court has "discretion to refuse to consider an untimely affidavit or to consider it, based on the circumstances in a particular case." *Schroeder v. Fuller*, 354 N.W.2d 780, 782 (Iowa 1984). The party

seeking reversal has the duty to demonstrate the district court abused its discretion. *Id*. To reverse, we must conclude that the district court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Kullish v. Ellsworth*, 566 N.W.2d 885, 889 (Iowa 1997).

We review summary judgment motions for correction of errors at law. *Stevens v. Iowa Newspapers, Inc*., 728 N.W.2d 823, 827 (Iowa 2007). We review the evidence in the light most favorable to the nonmoving party. *Id.* "When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party*." Eggiman v. Self-Insured Serv. Co*., 718 N.W.2d 754, 763 (Iowa 2006). Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits reveal no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558, 559 (Iowa 1994). On appeal of a summary judgment ruling, we must decide whether a genuine issue of material fact exists, and if the district court correctly applied the law. *Howell v. Merritt Co.*, 585 N.W.2d 278, 280 (Iowa 1998).

IV. Analysis

A. Motion to Continue

We first address Zech's argument that the district court erred by denying Zech's motion to continue the summary judgment hearing so she could obtain an affidavit that would support her resistance. Klemme asserted Zech violated Iowa

Rule of Civil Procedure 1.981(3) by waiting until April 20, 2010, the day of the hearing, to file the motion to continue. Rule 1.981(3) states:

> Any party resisting the motion [for summary judgment] shall file a resistance within 15 days, unless otherwise ordered by the court, from the time when a copy of the motion has been served. The resistance shall include a statement of disputed facts, if any, and a memorandum of authorities supporting the resistance. If affidavits supporting the resistance are filed, they must be filed with the resistance.

Zech argues that Schwartz's affidavit was essential to justify the resistance and therefore it was within the court's discretion to allow the continuance, pursuant to rule 1.981(6). Rule 1.981(6) provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The district court concluded that rules 1.981(6) and 1.981(3) must be read together, and therefore any affidavit filed requesting more time for discovery pursuant to rule 1.981(6) must be filed within the fifteen-day time period provided in rule 1.981(3). Accordingly, the district court held that Zech's motion was untimely and that the delay was prejudicial to Klemme.

When a party requests additional time to gather and submit affidavits in resistance to a motion for summary judgment, it is within the discretion of the trial court whether to allow additional time. *Kullish,* 566 N.W.2d at 889-90. The district court determined that it would prejudice Klemme to grant Zech a continuance, especially considering Zech's failure to seek relief from the court before the day scheduled for the summary judgment hearing. The court also

decided Zech's motion and supporting affidavit failed to set forth good cause. Zech asserts Klemme's deposition transcript was not available until after the fifteen-day deadline in rule 1.981(3) had elapsed and only after Zech received the transcripts outside the fifteen-day period did she realize that additional affidavits would be necessary to establish a genuine issue of material fact. Zech argues this fact, combined with the unsuccessful attempts to reach Schwartz and the necessity of his affidavit, justifies the delay in requesting a continuance.

Like the district court, we do not find this reason sufficient to excuse Zech's failure to file an affidavit pursuant to rule 1.981(6) until the day after the matter was set for hearing on the merits of the summary judgment motion. The party opposing the motion for summary judgment bears the responsibility of determining within the fifteen-day period for filing a resistance whether a continuance is necessary. If Zech did not know for certain she would be able to present affidavits creating a genuine issue of material fact at the summary judgment hearing, then she should have requested additional time to complete discovery within fifteen days after service of the summary judgment motion. Zech filed her original suit in February 2006 and dismissed that suit in May 2009. She filed the present action in July 2009 and had until March 24, 2010, to conduct discovery. In total, Zech had more than three and a half years to conduct discovery, making her failure to obtain evidence sufficient to withstand summary judgment within the allowable time period inexcusable. We find the district court's conclusions to be within its discretion and accordingly affirm the

denial of Zech's motion for additional time to resist the summary judgment motion.

B. Motion for Summary Judgment

Klemme's motion for summary judgment asserted that no genuine issue of material fact existed in regard to negligence and damages. The district court concluded a reasonable jury could find that Klemme failed to exercise ordinary care and found a genuine issue of material fact existed regarding negligence. The parties do not dispute this ruling on appeal.

The court then addressed the issue of causation, which Klemme did not raise in his motion for summary judgment. Upon careful consideration of the record, the court was unable to find factual support for Zech's allegation that Klemme's negligence caused the fire on Zech's property and the damage to her trees. As a result, the court granted Klemme's motion for summary judgment.

Both in her motion to enlarge and amend and again on appeal, Zech argues the district court should not have considered the issue of causation because Klemme did not assert causation as a basis for summary judgment. Zech does not cite authority to support this argument. But we do recognize "[t]he burden is upon the party moving for summary judgment to show absence of any genuine issue of a material fact." *Daboll v. Hoden*, 222 N.W.2d 727, 731 (Iowa 1974). Because Klemme's motion for summary judgment did not address causation, he did not carry this burden.

The next question is whether a district court may sua sponte consider a ground for summary judgment where the ground was not raised by a party.

Federal Rule of Civil Procedure 56(f) expressly recognizes a trial court may grant summary judgment on grounds not raised by a party so long as it gives the parties notice and a reasonable time to respond.[1] No similar provision appears in our state rules of civil procedure. And even if we wanted to recognize a district court's ability to enter summary judgments sua sponte on issues not raised by the parties, we could not do so here because the district court did not notify Zech of its intent to rule on the causation issue. Accordingly, we decline to affirm the district court's grant of summary judgment on the causation ground.

Finally, we turn to the district court's holding that no genuine issue of material fact exists regarding damages. As our supreme court noted more than twenty-five years ago: "It is impossible to state a simple, all-purpose measure of recovery for loss of trees." *Laube v. Estate of Thomas*, 376 N.W.2d 108, 109 (Iowa 1985). Consequently, district courts are given discretion to select the measure of damages based on the facts of each case. *Bangert v. Osceola County*, 456 N.W.2d 183, 191 (Iowa 1990).

Zech argues the appropriate calculation for damages is based upon the replacement cost of the trees. Where trees can be replaced, a reasonable cost of replacement is the appropriate measurement of damages. *Laube*, 376 N.W.2d at 109; *Grell v. Lumsden*, 206 Iowa 166, 169, 220 N.W. 123, 125 (1928). In

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[1] Federal Rule of Civil Procedure 56 provides:

> (f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:
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> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Laube, a case involving the removal of approximately one hundred walnut trees, the court stated that the replacement cost measure "would obviously be inappropriate here." *Laube*, 376 N.W.2d at 109. Similarly to *Laube*, a great number of trees have been damaged in this case, allegedly more than 400. Due to the large number of trees damaged, a replacement calculation would be inappropriate. In addition, Zech admitted she has not replaced or treated any of the damaged trees since the fire in 2005, nor has she expressed an intent to do so in the future. Consequently, replacement cost is not the proper measure of damages in this case.

The district court concluded as a matter of law that the appropriate measure of damages for Zech's loss is the "special purpose" calculation set forth in *Laube.* Where trees are put to a "special purpose," such as for windbreaks, shade or ornamental use, the calculation for damages is based upon the difference between the market value of the land before and after the destruction of the trees. *Id*. Furthermore, when trees have a special use, the difference in market value of the land should be used as a calculation, rather than the commercial value of the trees themselves.[2] *Bangert*, 456 N.W.2d at 190.

The district court viewed the conservation use of the trees as required by CRP to be a special purpose and concluded that any enjoyment Zech derived from the trees was incidental to the primary purpose of the CRP land. We agree with the district court's conclusion in respect to the CRP special purpose. In her April 8, 2009 deposition, Zech stated that the burned trees reduced her

[2] Additionally, because the land's enrollment in CRP prevented Zech from harvesting the trees, the trees possessed no value as lumber.

enjoyment of the land. Zech stated she no longer regularly walks on the CRP land, citing the fact that "there has been too much snow for one thing." Zech also stated she used to walk on the land regularly with her late husband, but stopped this activity when he passed away. Zech also admitted that the fire did not cause her to change her use of the land. No other evidence exists in the record relating to Zech's enjoyment. We agree with the district court that Zech's deposition testimony did not sufficiently establish a special use relating to her enjoyment of the land, nor a diminution in her enjoyment due to the fire. Using the "special purpose" market value calculation, the district court concluded that the issue of damages entitled Klemme to summary judgment because the record did not demonstrate a loss in market value of the land. We find the calculation chosen by the district court to be correct as a matter of law. Because we agree Zech has not sustained any compensable economic loss as a result of the fire, we affirm the district court's summary judgment ruling on the ground of damages.

AFFIRMED.