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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0106

Timothy Boldt,
Appellant,

vs.

Mike's Electrical Central MN, LLC, d/b/a Mike's Electric,
Respondent.

Filed November 27, 2017
Affirmed
Halbrooks, Judge

Stearns County District Court
File No. 73-CV-15-7959

E. Curtis Roeder, Alexander M. Jadin, Finn S. Jacobsen, Roeder Smith Jadin, PLLC, Bloomington, Minnesota (for appellant)

Mark S. Brown, Stephen M. Warner, Christopher C. Alexander, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the district court's grant of summary judgment to respondent on the issues of real- and personal-property damages in this negligence action. We affirm.

FACTS

Appellant Timothy Boldt hired respondent Mike's Electrical Central MN, LLC, d/b/a Mike's Electric to perform electrical work on Boldt's property, which included five acres, a manufactured dwelling, a detached garage, and a storage shed. Mike's Electric negligently caused a fire that damaged Boldt's dwelling and certain personal-property items inside it. There was no damage to the other structures or the land itself.

Boldt's homeowner's insurer inspected the dwelling and personal property after the fire, calculated the replacement-cost and actual-cash values of the loss, and settled with Boldt for $237,776, paying $158,517 for the damaged dwelling and $79,259 for damaged personal property. Instead of restoring the fire-damaged dwelling, Boldt demolished the house and the detached garage and built a new manufactured dwelling with an attached garage.

Boldt sued Mike's Electric for negligence, seeking real- and personal-property damages. Both parties moved for summary judgment. Boldt argued that Mike's Electric negligently caused the fire and that the fire totally destroyed the dwelling and personal property, entitling him to $171,584 in replacement-cost damages for a new dwelling and new personal-property items.[1] Mike's Electric maintained that the dwelling was partially destroyed and that Boldt was entitled to damages based on the lesser of the change in market value of the dwelling or restoration costs, but not replacement costs.

[1] Boldt added the costs to replace the damaged dwelling, utility hookups, and the foundation. He also included personal-property items and demolition costs that were not fully covered by his insurance settlement.

The district court denied both motions. The district court concluded that genuine issues of material fact existed with respect to liability and damages. With respect to dwelling damages, the district court advised the parties that the measure of damages for tortious destruction of property is dependent on whether the property was totally or partially destroyed. The district court explained that if the dwelling was totally destroyed, damages are measured by market value before the fire. But if the dwelling was partially destroyed, damages are measured by the lesser of the change in market value or cost to restore. The district court stated that Boldt's argument that replacement cost is the proper damages measure had no legal basis. The district court concluded that there was a genuine issue of material fact as to whether the dwelling was totally or partially destroyed. With respect to personal-property damages, the district court concluded that, based on Boldt's itemized list of damaged personal property and Boldt's deposition testimony, there were genuine issues of material fact as to the value of the personal property.

Before trial, Mike's Electric moved in limine to set the dwelling-damages measure at the dwelling's change in market value and to preclude Boldt from testifying as to property market values. Boldt asserted that he was entitled to elect his damages measure between market value and cost to restore the dwelling because the dwelling was partially destroyed.

The district court denied Mike's Electric's motion. With respect to calculating dwelling damages, the district court stated that the maximum recoverable damages at trial equaled the dwelling's market value before the fire. The district court reasoned that if the restoration cost was materially greater than the market value before the fire, then the damages measure was market value at the time of the fire, less the value of its remains.

The district court noted that Boldt had changed his dwelling-damages theory after the district court denied the cross-motions for summary judgment. In support of Boldt's motion for summary judgment, he alleged that the dwelling was totally destroyed. After moving for summary judgment, Boldt maintained that the dwelling was partially destroyed, and, therefore, he could elect his damages measure. The district court stated that Boldt was "nominally correct" that he was entitled to elect damages if the dwelling was partially destroyed but expressed concern that Boldt "may be using this argument in an attempt to recover damages in material excess of the market value of the house before its destruction."

In denying Mike's Electric's motion to exclude Boldt from testifying, the district court reasoned that, in Minnesota, the owner of both real and personal property is presumed to be acquainted with its value and may therefore testify as to its value, citing *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 6, 74 N.W.2d 305, 309 (1955). The district court noted that any lack of foundation in the owner's testimony goes to weight, rather than admissibility of the testimony, citing *Jackson v. Buesgens*, 290 Minn. 78, 82, 186 N.W.2d 184, 186-87 (1971). The district court explained that Mike's Electric would be free to impeach Boldt's testimony as to the value of his property, to raise objections in the normal course of trial, and to make arguments as to its foundation and Boldt's credibility.

Because Mike's Electric and Boldt stipulated pre-trial that Mike's Electric was negligent and that its negligence was a direct and proximate cause of Boldt's damages, the sole issue at trial was damages.

On the first day of the jury trial, Mike's Electric advised the district court that it wanted to renew its summary-judgment motion, raising concerns about Boldt's evidence and proposed testimony. The district court instructed the jury that there was a factual dispute as to whether the property was partially or totally destroyed and the amount of damages, if any, that Bolt was entitled to. Boldt testified on direct examination, in part, about 20 guns that had not been previously disclosed as damaged property to either his homeowner's insurer or to Mike's Electric.

On the second day of trial, Mike's Electric renewed its summary-judgment motion on dwelling and personal-property damages. The district court granted Mike's Electric's summary-judgment motion, reasoning that Boldt had not and could not produce admissible evidence sufficient to prove his claims for real- and personal-property damages. This appeal follows.

D E C I S I O N

Boldt argues that the district court improperly granted summary judgment because genuine issues of material fact exist regarding real- and personal-property damages, reasoning that (1) he can elect his damages measure, (2) he did not have the chance to testify to real- and personal-property market values, and (3) the district court abused its discretion by excluding Boldt's insurance adjuster's testimony on market values.

On an appeal from summary judgment, we review de novo whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). No genuine issue of material fact for trial exists "when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Summary judgment will be affirmed if it can be sustained on any ground. *Winkler v. Magnuson*, 539 N.W.2d 821, 828 (Minn. App. 1995), *review denied* (Minn. Feb. 13, 1996).

I. Dwelling damages

Damages for totally destroyed real property are measured by the market value before the loss. *See Giacomino v. Tri-State Ins. Co.*, 595 N.W.2d 530, 532 (Minn. App. 1999) (applying rule to personal property). Where real property is damaged but not totally destroyed, "the ordinary measure of damages is the difference in value before and after the loss, or the cost of restoration, whichever is less." *In re Commodore Hotel Fire & Explosion Cases*, 324 N.W.2d 245, 248 (Minn. 1982).

At the time that Mike's Electric renewed its motion for summary judgment, the record evidence included (1) documents providing Boldt's insurance company's replacement-cost values and actual-cash values, (2) a construction company's quote to replace Boldt's fire-damaged dwelling with a brand-new dwelling, and (3) Boldt's deposition testimony on the price for which Boldt believed he could have sold his entire property before the fire. This evidence, when viewed in the light most favorable to Boldt, is not sufficiently probative with respect to Boldt's dwelling damages claim to permit reasonable persons to reach different conclusions. *See DLH*, 566 N.W.2d at 71.

First, actual-cash-value calculations are not evidence of market value. Actual-cash value is a "legal term of art that refers to the 'actual loss' sustained by the insured." *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 784 (Minn. 2016). Market value is defined as the "amount that a seller may expect to obtain for merchandise, services, or securities in the open market," *see The American Heritage Dictionary* 1075 (5th ed. 2011), and in the property-tax context as "the usual selling price at the place where the property to which the term is applied shall be at the time of assessment," *see* Minn. Stat. § 272.03, subd. 8 (2016) (providing definitions for Minnesota's property taxes statutes). Here, Boldt's homeowner's insurance adjuster calculated actual-cash value based on "replacement cost less any applicable depreciation for age and condition"—not based on the price for which Boldt expected to receive on the open market from a willing buyer before the fire. *See Commodore*, 324 N.W.2d at 248; *see also Schleiff v. County of Freeborn*, 231 Minn. 389, 396-97, 43 N.W.2d 265, 269-70 (1950) (explaining that, under Minn. Stat. § 272.03 (1948), an expert "correctly defined market value as the value the property would sell for on that date in a sale from one not required to sell to one not required to buy" and that a different expert's opinion defining market value as "replacement less depreciation" could not alone "support the trial court's findings").

Second, the record contains evidence showing the cost to replace Boldt's damaged dwelling with a brand-new dwelling. Boldt continues to assert on appeal that replacement cost is a proper damages measure for real property. In support of his argument, Boldt cites *Rector, Wardens & Vestry of St. Christopher's Episcopal Church v. C. S. McCrossan, Inc.*, which involved damaged trees and shrubbery. 306 Minn. 143, 146, 235 N.W.2d 609, 611 (1975). But *Rector* does not apply to dwelling damages, which are measured by the change in market value or the cost of restoration. *See Commodore*, 324 N.W.2d at 248.

On appeal, for the first time, Boldt asserts that the "property" from which his damages should be measured includes the land, dwelling, detached garage, and storage shed—not the dwelling alone.[2] Boldt argues that the district court, in its order granting summary judgment, resolved a disputed material fact by reasoning that "the entire property was not destroyed." We disagree.

Even if the property were framed as including the land, dwelling, detached garage, and storage shed, there would still be no genuine issue of material fact as to whether the entire property was destroyed. The evidence, when viewed in the light most favorable to Boldt, demonstrates that the fire damaged only Boldt's dwelling and personal property. Boldt never contended that there was any damage to the land, detached garage, or storage shed. And while Boldt testified at his deposition that he could have sold the entire property for $240,000 before the fire, he was unable to provide any testimony or other evidence of the market value for the entire property after the fire. Without both, Boldt cannot prove the change in market value. Therefore, summary judgment would still be proper.

Citing a string of personal-property damage cases, Boldt also argues that he is entitled to elect his measure of damages for real property between the change in market value and the cost of restoration. *See O'Connor v. Schwartz*, 304 Minn. 155, 158, 229 N.W.2d 511, 513 (1975) (involving a damaged 1967 Buick); *Hart v. N. Side Firestone Dealer*, 235 Minn. 96, 98, 49 N.W.2d 587, 588 (1951) (involving a damaged automobile engine); *Kopischke v. Chicago, St. P., M. & O. Ry. Co.*, 230 Minn. 23, 30-31, 40 N.W.2d 834, 839 (1950) (involving

[2] In his complaint and leading up to this appeal, Boldt defined the "property" using his mailing address but alleged only damage to his dwelling and personal property.

a damaged pickup truck); *Waseca Sand & Gravel, Inc. v. Olson*, 379 N.W.2d 592, 595 (Minn. App. 1985) (involving a damaged cement truck). We disagree, as did the district court. But even if the election-of-remedy rule applied to real property, summary judgment would still be proper because Boldt did not produce sufficiently probative market-value or restoration-cost evidence with respect to his dwelling damages claim to permit reasonable persons to reach different conclusions. *DLH*, 566 N.W.2d at 71.

II. Personal-property damages

Boldt also contends summary judgment is improper on his claim for personal-property damages. When personal property is totally destroyed, damages are measured by the market value before the loss. *Giacomino*, 595 N.W.2d at 532. The district court granted summary judgment to Mike's Electric on Boldt's claim for personal-property damages because he did not produce admissible evidence of the market value of the damaged personal property before the loss. The district court determined that Boldt could not testify concerning replacement cost for his personal property because replacement cost was not the correct damages measure and, to the extent that Boldt testified regarding damaged guns, he had not disclosed those items before trial. The only evidence of personal-property damages came from Boldt's insurance company's actual-cash value determinations and an itemized list prepared by Boldt with the cost to replace his personal-property items. As we have previously discussed, these values do not show the market value of Boldt's personal-property items.

III. Boldt's proposed market-value testimony

Boldt contends that summary judgment was improperly granted because he did not have the opportunity to testify at trial concerning his dwelling and personal-property damages.

A real- or personal-property owner may, as a rule, testify on property market values without any particular foundation being laid. *Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984); *see Williamson v. Prasciunas*, 661 N.W.2d 645, 653 (Minn. App. 2003) (applying rule to personal property). But "that rule must be subject to some limitation where the opinion of the owner of the property is wholly incredible." *Hous. & Redev. Auth. v. Zweigbaum*, 257 Minn. 233, 235, 100 N.W.2d 719, 721 (1960).

In its summary-judgment order, the district court noted that Boldt planned only on introducing evidence at trial from his deposition testimony in which he opined on the value of his property. The district court acknowledged that Boldt is presumed to be qualified to testify as to his dwelling's value under well-established Minnesota law. But the district court reasoned that Boldt had "essentially rebutted the presumption that he is acquainted with the value of his house" because he testified at his deposition that he did not know "the specific value of the house as differentiated from the rest of the property."

For his claims of both real- and personal-property damages, Boldt intended to introduce evidence showing the costs to replace Boldt's dwelling and personal property with a brand-new dwelling and brand-new personal-property items. And while Boldt testified to the value of guns, he failed to disclose those values before trial. Because the cost to replace Boldt's damaged property with brand-new property is not the proper measure of market value and because Boldt's testimony concerned undisclosed personal property—guns—the district court's evidentiary rulings were a proper exercise of its discretion.

IV. Boldt's undisclosed expert testimony

Boldt argues that the district court abused its discretion by excluding his homeowner's insurance adjuster's opinions on real- and personal-property values, contending that the insurance adjuster was a lay witness or, alternatively, because Mike's Electric deposed the insurance adjuster, there was no surprise or prejudice to Mike's Electric if he were to testify to property values. We disagree.

The district court ruled that Boldt's insurance adjuster could not testify to the value of the destroyed personal property because Boldt did not identify the insurance adjuster as an expert witness before trial. In response to Boldt's contention that the insurance adjuster would offer a lay opinion, the district court stated that it was a "blatant argument" by Boldt to convert his insurance adjuster's expert opinion into a lay opinion so as to overcome his failure to provide proper notice of the adjuster's testimony.

A district court's evidentiary ruling on the admissibility of an expert opinion "will not be reversed unless it is based on an erroneous view of the law or it is an abuse of discretion." *Gross v. Victoria Station Farms, Inc.*, 578 N.W.2d 757, 760 (Minn. 1998). Boldt stated that he intended to call his insurance adjuster to testify regarding his "background as an insurance adjust[e]r and his experience with respect to reviewing property and looking at it after it's been damaged" and to provide his opinion that actual-cash value equals market value. The district court's determination that the insurance adjuster's testimony amounted to expert opinion on market value that was precluded because it was undisclosed was well within the district court's discretion.

Because the district court determined that there were no genuine issues of material fact for trial and because Boldt did not produce any admissible evidence sufficiently probative with respect to his dwelling or personal-property damages claim to permit reasonable persons to reach different conclusions, we conclude that the district court properly granted summary judgment to Mike's Electric.

Affirmed.