STATE OF MICHIGAN

COURT OF APPEALS

DANA ALDRICH,

Plaintiff-Appellant,

v

RICHARD BEDELL and CLAUDIA BEDELL,

Defendants-Appellees.

UNPUBLISHED
May 7, 1996

Nos. 168395 & 171484
LC No. 92-00333-NO

Before: Doctoroff, C.J., and Hood and Gribbs, JJ.

PER CURIAM.

The trial court granted defendants' motion for summary disposition on plaintiff's claim of nuisance arising from an automobile accident between plaintiff and defendants' dogs. A jury found no cause of action on plaintiff's negligence claim arising out of the same incident. Plaintiff appeals as of right. We affirm in part and reverse in part.

Plaintiff was driving down the street in her van when defendants' dogs ran in front of her car. Plaintiff immediately braked, but one dog hit the windshield of the car and the other dog slid under the car. When the police arrived, plaintiff informed them that she was not injured. The police officer found plaintiff's vehicle undamaged. Three days later, plaintiff filed a police report indicating that she suffered a back injury in the accident. Plaintiff had a history of back problems prior to the accident.

Defendant Claudia Bedell testified that her dogs escaped because the high winds had blown a large piece of plywood off their dog pen. Defendant Richard Bedell testified that the dogs were not licensed with the city of Cheboygan, where defendants resided.

After amendments, plaintiff's complaint contained two counts. First, plaintiff alleged that defendant's failure to obey the Cheboygan leash law constituted a breach of a duty to plaintiff. Because the dogs caused the resultant damages, plaintiff alleged that defendants were negligent. Second, plaintiff maintained that defendant's failure to follow the licensing ordinance constituted a nuisance. After

plaintiff presented her evidence, the trial court granted defendants' motion for summary disposition on plaintiff's nuisance claim. The jury found no cause of action on plaintiff's negligence claim.

First, plaintiff alleges that the trial court erred when it granted defendants' motion for summary disposition on her nuisance claim. Because plaintiff's claim is based on a Cheboygan ordinance which defines a public nuisance, we assume that plaintiff's claim alleged a public nuisance. A private citizen may file a claim alleging a public nuisance if she can show that she suffered a harm different from that suffered by other members of the general public exercising the right common to the general public that was the subject of interference. *Adkins v Thomas Solvent Co.*, 440 Mich 293, 306 n 11; 487 NW2d 715 (1992).

Plaintiff cites the Cheboygan ordinance that requires all dogs to be licensed as evidence of defendants' public nuisance. Even if the violation of this ordinance qualifies as a public nuisance, the licensing of dogs is the right common to the general public that was the subject of interference. Plaintiff did not suffer a harm based on the failure of defendants to license their dogs. Whether or not defendants had obtained licenses for their dogs, the dogs could have escaped from their pen and ran into the street. In other words, because the alleged public nuisance had no relationship to plaintiff's claimed damages, plaintiffs had no standing to file a claim of public nuisance. The trial court properly granted defendant's motion for summary disposition as to plaintiff's nuisance claim.

Next, plaintiff argues that the trial court erred when it denied her motion for summary disposition pursuant to MCR 2.116(C)(9) on her negligence claim. A motion for summary disposition under MCR 2.116(C)(9) is tested solely by reference to the parties' pleadings. When a material allegation of the complaint is categorically denied, summary disposition under MCR 2.116(C)(9) is improper. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47; 457 NW2d 637 (1990). Because, in their answer, defendants denied that they breached a duty that proximately caused plaintiff's alleged injuries, the trial court properly denied plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9).

Third, plaintiff argues that the trial court erred when it excluded weather records that plaintiff sought to admit into evidence. Plaintiff sought to refute defendant's testimony that the wind blew a piece of plywood off the dog pen by introducing records of the wind velocity taken by the National Weather Service on that day. The trial court excluded the records on hearsay grounds. Plaintiff maintains that the records should have been admitted pursuant to the business records exception to the hearsay rule.

A report, record, or data compilation, made by a person with knowledge, if kept in the course of a regularly conducted business activity, can be admitted as an exception to the hearsay rule. MRE 803(6). A business record exception to the hearsay rule is justified because of habit, the detection of errors, and an employer's reliance on the result. Habit, by its very nature, calls for accuracy. Consequently, errors or unintentional misstatements are almost certain to be detected. *Solomon v Shuell*, 435 Mich 104, 120; 457 NW2d 669 (1990) (opinion of Archer, J.). In this case, the witness, an employee with the National Weather Service, testified that he could not guarantee the accuracy of the weather records because they were not the certified records from the archives of the National

Weather Service. The records are not certified until all mistakes are corrected. Because this witness indicated that the traditional indicia of trustworthiness were absent for these business records, the trial court properly excluded this evidence.

Fourth, plaintiff maintains that the trial court erred when it excluded the "dog-at large" report which she attempted to admit into evidence. Because plaintiff cites no authority in support of her argument, this issue is not preserved for review. *Vugterveen v Olde Millpond*, 210 Mich App 34, 47; 533 NW2d 320 (1995). Even if this issue were preserved for review, the trial court properly refused to admit plaintiff's evidence. Evidence that, while caring for the dogs, a neighbor allowed defendant's dogs to run at large is not relevant to plaintiff's claim that defendants allowed the dogs to run through the neighborhood.

Fifth, plaintiff argues that the trial court erred during its reading of the jury instructions. Plaintiff contends that, when the trial court defined the words "permit" and "allow" to the jury in reference to the Cheboygan lease and license ordinances, the trial court misled the jury regarding the meaning of those ordinances. Because the ordinances contained the terms "allow" and "permit," we find that it was appropriate for the trial court to define these terms for the jury. Because the trial court read the dictionary definitions of these terms, we do not find that the instructions misled the jury. Although plaintiff contends that the trial court refused to read her theory of the case to the jury, the trial court only refused to give the jury a legally incorrect instruction. *Comm Union Ins v Liberty Ins*, 137 Mich App 381, 387; 357 NW2d 861 (1984). The trial court did not err when it read the instructions to the jury.

Finally, plaintiff argues that the trial court improperly awarded attorney fees to defendant and approved defendants' bill of costs. Reluctantly, we agree that the trial court improperly awarded attorney fees to defendant. On February 22, 1993, defendants offered to stipulate to a judgment in exchange for a $500 settlement. Plaintiff did not respond to that offer of judgment. On July 7, 1993, a mediation evaluation awarded $9500 to plaintiff. One member of the mediation panel dissented. On August 6, 1993, defendants rejected the mediation evaluation.

Because defendant rejected the mediation evaluation, defendant is not entitled to costs and attorney fees pursuant to MCR 2.403(O). Defendant would be entitled to costs and attorney fees pursuant to MCR 2.405(D) because plaintiff rejected defendant's offer of judgment by failing to accept or present a counter-offer. However, where there are rejections under both sections, the last rejection controls for purposes of determining costs. MCR 2.405(E); *Freysinger v Taylor Supply*, 197 Mich App 349, 354; 494 NW2d 870 (1992). Considering the result of this case, the last act of plaintiff was to reject a reasonable settlement offer while the last act of defendants was to reject an unreasonable mediation offer. Nevertheless, we must adhere to the language of the court rules. *Freysinger, supra* at 355. Although defendants correctly point out that costs will not be awarded if the mediation evaluation is not unanimous, they have not provided any legal authority for their argument that the lack of unanimity entitles them to sanctions pursuant to the offer of judgment rule as if no mediation took place. The trial court erred when it awarded costs to defendant pursuant to MCR 2.405(D).

We affirm the dismissal of plaintiff's nuisance claim and all of the trial court's ruling's during the course of the trial. We reverse the trial court's ruling as to costs pursuant to MCR 2.405(D). Because defendant may be entitled to certain costs on other grounds, we remand for a redetermination of costs due to defendant.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Roman S. Gribbs