

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JOHN OWENS, ET AL.

v.

CONTIGROUP COMPANIES, INC., ET AL.

RESPONDENTS,

APPELLANTS.

DOCKET NUMBER WD72560

DATE: March 29, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Jay A. Daugherty, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Attorneys:

Charles F. Speer, Tammy R. Dodson, and Peter B. Bieri, Kansas City, MO; Gerald L. Cross, Jr., Overland Park, KS; Edward D. Robertson, Jr. and Anthony L. DeWitt, Jefferson City, MO, for respondents.

Jean P. Bradshaw II, Mara H. Cohara, and William G. Beck, Kansas City, MO, for appellants.

MISSOURI APPELLATE COURT OPINION SUMMARY

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Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

ContiGroup Companies Inc., Premium Standard Farms, LLC, and KC2 Real Estate, LLC (collectively "PSF"), appeal following a jury trial on claims of temporary nuisance which resulted in a judgment for damages in favor of thirteen individual respondents ("Respondents").

PSF, operate large scale hog farms in, as pertinent to this appeal, three Missouri counties (Gentry, Daviess, and Grundy counties). The Respondents in this case are fifteen individuals who filed suit against PSF claiming the hog farming operation in Gentry County constituted a temporary nuisance.

After a jury trial, thirteen of the Respondents were awarded \$825,000 each and the other two Respondents were awarded amounts of \$250,000 and \$75,000. PSF now appeals, raising six points.

AFFIRMED

DIVISION THREE HOLDS: In Point One, PSF argue that the Respondents failed to make a submissible case on the issue of damages because there was no evidence introduced as to economic damages to the Respondent's farms as they are "business properties." Although PSF argue that economic damages are the only measure of damages appropriate for business properties, this is not the law of Missouri. Missouri law allows for non-economic damages for the loss of the use and enjoyment of land. The mere fact that business activities may be conducted on land does not mean as a matter of law that the owners of the land are not entitled to reasonable non-economic damages arising from a temporary nuisance. Point One is denied.

In Point Two, PSF argue the Circuit Court erred in modifying MAI 22.06 to include the term "farm" because it erroneously stated the law by inviting the jury to award an improper measure of damages (non-economic damages) for the farms which are "business" properties. As discussed in Point One, non-economic damages are an appropriate measure of damages for temporary nuisance with respect to farmland. The verdict-director was modified to reflect the particular circumstances of this case and accurately set forth the substantive law. Point Two is denied.

In Point Three, PSF argue the Circuit Court erred in modifying the third paragraph of the verdict director, MAI 22.06, to include the phrase "other emissions" because there was no evidence at trial of other emissions upon which a temporary nuisance verdict could be found. There was substantial evidence introduced at trial that ill odors, the chemical components of ill odors (ammonia and hydrogen sulfide), particulate matter and swine effluent travelled onto the Respondents' land. Therefore, the modification of MAI 22.06 to include the term "other emissions" was supported by substantial evidence.

In Point Four, PSF argue the Circuit Court erred in reconsolidating Respondents' individual nuisance cases for trial by proximity to each PSF operation because the evidence before the court supported the original Severance Order but not reconsolidation. Rule 66.01(b) allows the circuit court to consolidate civil cases for trial if any or all matters in issue involve common questions of law or fact. Here, there were overwhelming overlaps of questions of law and fact that each case had in common. It was not an abuse of the trial court's discretion to consolidate the cases. Point Four is denied.

In Point Five, PSF argue the Respondents were judicially estopped from offering the testimony of an expert witness, Dr. Lawrence, that flies traveled from PSF's hog operation to Respondents' properties and that PSF's operation posed a risk of adverse health consequences for Respondents because Respondents had previously represented to the court that their nuisance claims did not include fly, health, or medical components when they argued successfully for reconsolidation of the actions. Judicial estoppel "in its basic form, applies to prevent litigants from taking a position in one judicial proceeding, thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time." Here, PSF is attempting to utilize judicial estoppel within the confines of a single case. This court is not persuaded it should be applied in these circumstances. Judicial estoppel in Missouri has not been applied to bind the trial court in its great discretion over the admittance of evidence in a single case, and we refuse to do so here. Point Five is denied.

In Point Six, PSF argue the Circuit Court erred in not setting aside the verdicts and ordering a new trial because the awards of compensatory damages were grossly excessive and were caused by passion and prejudice of the jury resulting from errors by the trial court in that the court improperly consolidated Respondents' claims, admitted improper evidence, and gave erroneous instructions to the jury. First, PSF has not identified any errors at trial or alleged misconduct that caused bias or prejudice, which is a prerequisite to a finding that the jury's verdict was excessive or unwarranted. Secondly, PSF has not shown that the jury's verdict was excessive. Contrary to PSF's assertion, damages in a temporary nuisance claim are not limited to the market value of the underlying land. Also, PSF never argued to the jury what in its view was the proper amount of damages. Point Six is denied.

Opinion by Gary D. Witt, Judge

March 29, 2011

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