

COURT OF APPEALS OF GEORGIA

Dukes v. Burke, 139 Ga. App. 583

228 S.E.2d 729 (Ga. Ct. App. 1976) · No. 52486, 52487 · Decided September 16, 1976

SUMMARY

The Georgia Court of Appeals held that evidence concerning the possible re-ignition of cotton during transport created a jury issue on the defendant trucker's negligence, making directed verdict improper. The court also held that the trial court abused its discretion by opening a third-party defendant's default based solely on misunderstanding of third-party practice and unfamiliarity with the law. The judgments were reversed in both related appeals.

CASE DETAILS

COURT	Court of Appeals of Georgia
WRITING FOR THE COURT	McMurray, Judge; Marshall; McMurray; Smith
JURISDICTION	Georgia
DECIDED	September 16, 1976
DOCKET	52486, 52487
DISPOSITION	reversed
PROCEDURAL POSTURE	Dukes appealed after the trial court directed a verdict for Burke and denied Dukes's motion for a new trial. Burke cross-appealed the directed verdict and judgment in favor of third-party defendant Hendley, as well as the order opening Hendley's default.
STANDARD OF REVIEW	A directed verdict must be viewed by construing the evidence most strongly in favor of the party opposing the motion. Questions of negligence are ordinarily for the jury. An order opening a default judgment is reviewed for abuse of the trial court's legal discretion.
PRECEDENTIAL VALUE	Published precedential opinion of the Court of Appeals of Georgia
PARTIES	Murray Dukes, Burke on cross-appeal v. Burke, Hendley Transfer Co. on the third-party claim

TOPICS

- negligence
- default judgment
- third party practice
- damages
- civil procedure

PRACTICE AREAS

torts

civil procedure

remedies

QUESTIONS PRESENTED

1. Whether the evidence created a jury issue on Burke's negligence in transporting cotton that may still have been burning.
2. Whether the trial court abused its discretion by opening Hendley's default based solely on pleadings asserting misunderstanding of third-party practice, unfamiliarity with the law, and lack of retained counsel.
3. Whether the measure of damages in this ex delicto action was for the jury to determine.
4. Whether the directed verdict for the third-party defendant was proper when an issue of fact remained in the event Burke was held liable.

HOLDINGS

1. The trial court erred in directing a verdict for Burke because the evidence permitted an inference that the cotton was still burning when it departed and that the fire was negligently rekindled during transport.
2. The trial court abused its discretion by opening Hendley's default because the pleadings showed only a misunderstanding of third-party practice, unfamiliarity with the law, and lack of retained counsel, without supporting facts sufficient to authorize opening the default.
3. Because the action was ex delicto, the measure of damages was for the jury to determine based on the evidence.
4. The trial court erred in directing a verdict for Hendley because a factual issue remained for the jury if Burke were found liable.

KEY QUOTATIONS

"Ignorance of the law is never an excuse for inaction." (139 Ga. App. at 585)

"Questions of negligence are peculiarly a matter for jury determination." (139 Ga. App. at 585)

FACTUAL BACKGROUND

Johnson, doing business as Hendley Transfer Co., received cotton for transport from Millen to Augusta. The cotton caught fire while parked overnight, and after damaged bales were separated, Burke transported the remaining cotton to a salvage company. Approximately 35 miles into the trip, the cotton caught fire again and the fire spread to a tenant house and 13 acres of land owned by Murray Dukes.

PROCEDURAL HISTORY

After cotton being transported by Burke caught fire and damaged Dukes's tenant house and 13 acres of land, Dukes sued Burke for property damages. Burke filed a third-party action against Hendley. The trial court

directed verdicts for Burke and Hendley, denied Dukes's motion for a new trial, and opened Hendley's default. The Court of Appeals reversed in both cases.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The judgments and rulings were reversed in both cases, requiring further proceedings consistent with the opinion, including jury determination of negligence and damages and reconsideration of the third-party claim and default.

CASES CITED

- Murray v. Gamble, 127 Ga. App. 855, 195 S.E.2d 461
- Kesler v. Kesler, 219 Ga. 592, 134 S.E.2d 811
- Kilgore v. Nasworthy, 124 Ga. App. 261, 262 (6), 183 S.E.2d 481
- Lincoln Property Co. No. 4 of Atlanta v. Stasco Plumbing, Inc., 130 Ga. App. 767, 768, 204 S.E.2d 449
- Garrett v. Royal Bros. Co., 225 Ga. 533, 536, 170 S.E.2d 294
- Seaboard A. L. R. v. Blackwell, 16 Ga. App. 504 (3), 85 S.E. 686
- Beckham v. Seaboard A. L. R., 127 Ga. 550, 534, 56 S.E. 638
- Houston v. Lowes of Savannah, 235 Ga. 201, 219 S.E.2d 115
- Johnson v. Durrence, 136 Ga. App. 439, 440, 221 S.E.2d 652
- Strickland v. Galloway, 111 Ga. App. 683, 143 S.E.2d 3
- Fitzgerald v. Morgan, 200 Ga. 651, 655, 38 S.E.2d 171
- Prince v. Friedman, 202 Ga. App. 136 (2), 42 S.E.2d 434
- First Fidelity Ins. Corp. v. Busbia, 128 Ga. App. 485, 197 S.E.2d 396

OPINION

MCMURRAY, J.

139 Ga. App. 583 (1976) 228 S.E.2d 729 DUKES v. BURKE et al.; and vice versa. 52486, 52487. Court of Appeals of Georgia. Argued July 7, 1976. Decided September 16, 1976. Thomas A. Hutcheson, for appellant. W. Ward Newton, R. H. Reeves, III, for appellees. McMURRAY, Judge.

On October 16, 1973, Johnson, d/b/a Hendley Transfer Co., received a load of cotton from Millen Fertilizer & Gin Company for transport from Millen to Augusta, Georgia. While parked on Hendley's premises *584 during the night it was discovered that the cotton was on fire.

The fire was suppressed by the Millen Fire Department but only after damage to several bales of cotton. The cotton which had become wet with soap and water during the process of suppressing

the fire was unloaded and a few heavily damaged bales separated from the balance. Arrangements were then made by Hendley with another trucker, Burke, to convey the larger portion of the cotton to a salvage company in Peachtree City, Georgia.

Some eight days later, Burke transported the cotton, and near Bartow, Georgia, in Washington County, the cotton was again on fire. Efforts to put it out were to no avail and the fire eventually spread to a tenant house and 13 acres of land (bermuda grass) adjoining the roadway. Murray Dukes, owner of the land, sued Burke for damages to his property; and defendant Burke brought a third-party action against Hendley.

After a trial, the court directed a verdict for both the defendant and third-party defendant. Plaintiff's motion for new trial was denied, and he appeals in Case No. 52486. Defendant cross appeals from the direction of the verdict and judgment in favor of the third-party defendant, and from an order opening the default of the third-party defendant in Case No. 52487.

Held: 1. Even though the evidence shows that the cotton was under continuous observation for eight days, was wet down periodically and during which time it rained and was allegedly not on fire when the tractor-trailer departed, yet within approximately 35 miles of the beginning point, the bales of cotton, not covered by a tarpaulin, were found to be again on fire, and eventually while traveling in a rural area, burned plaintiff's property.

Construing the evidence most strongly in favor of the party opposing the motion for directed verdict (*Murray v. Gamble*, 127 Ga. App. 855 (195 SE2d 461); *Kesler v. Kesler*, 219 Ga. 592 (134 SE2d 811)), inferences that the cotton was still on fire when it departed, and was fanned by the friction of the open air, with no tarpaulin enclosing it, made it a jury issue as to defendant's negligence in *585 transporting burning cotton bales.

See *Kilgore v. Nasworthy*, 124 Ga. App. 261, 262 (6) (183 SE2d 481); *Lincoln Property Co. No. 4 of Atlanta v. Stasco Plumbing, Inc.*, 130 Ga. App. 767, 768 (204 SE2d 449). Questions of negligence are peculiarly a matter for jury determination. *Garrett v. Royal Bros. Co.*, 225 Ga. 533, 536 (170 SE2d 294); *Seaboard A. L. R. v. Blackwell*, 16 Ga. App. 504 (3) (85 S.E.

686). The jury, from consideration of all evidence, could have found that the fire in this instance had been negligently re-kindled. *Beckham v. Seaboard A. L. R.*, 127 Ga. 550, 534 (56 S.E. 638). The court erred in directing this verdict for defendant. 2. A trial judge may not abuse the required exercise of legal discretion.

Here the default judgment against the third-party defendant was opened purely on the basis of the pleadings without consideration of fact. The third-party defendant's motion to dismiss and to open default states, "that he misunderstood the nature of the Third Party practice," that he "did not understand that a Third Party Complaint exposed him to potential liability," that he is "unfamiliar with the law," and that he "was not represented by retained counsel."

These statements do not constitute a proper case for the opening of a default judgment under the provisions of Code Ann. § 81A-155 (b) (§ 55 CPA). Notwithstanding the recent decision in *Houston v. Lowes of Savannah*, 235 Ga. 201 (219 SE2d 115), the trial court abused its discretion in opening the default judgment against the third-party defendant. See *Johnson v. Durrence*, 136 Ga. App.

439, 440 (221 SE2d 652). Compare *Strickland v. Galloway*, 111 Ga. App. 683 (143 SE2d 3). No facts were shown, and the allegations of fact are totally insufficient to authorize the opening of the default. Ignorance of the law is never an excuse for inaction. *Fitzgerald v. Morgan*, 200 Ga. 651, 655 (38 SE2d 171); *Prince v. Friedman*, 202 Ga. App. 136 (2) (42 SE2d 434).

3. The action being one ex delicto, the measure of damages is for the jury to determine based upon the evidence. See Code Ann. § 81A-155 (a), *supra*. Compare *First Fidelity Ins. Corp. v. Busbia*, 128 Ga. App. 485 (197 SE2d 396). *586 4.

The court erred in directing a verdict in favor of the third-party defendant since an issue of fact remained for jury determination in the event a judgment was returned against the defendant Burke. Judgment reversed in both cases. Marshall and Smith, JJ., concur.