

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

SEP 24 2010

MICHAEL S. RICHIE
CLERK

SENECA TELEPHONE COMPANY,)
)
Plaintiff/Appellee,)
vs.)
)
MIAMI TRIBE OF OKLAHOMA, d/b/a)
WHITE LOON CONSTRUCTION COMPANY,)
)
Defendant/Appellant.)

Case No. 107,431
(Cons. w/107,432;
107,433 & 107,434)

APPEAL FROM THE DISTRICT COURT OF
OTTAWA COUNTY, OKLAHOMA

HONORABLE WILLIAM E. CULVER, TRIAL JUDGE

AFFIRMED

Leonard M. Logan,
Donna Louise Smith,
Michael T. Torrone,
LOGAN & LOWRY, L.L.P.,
Vinita, Oklahoma,

For Plaintiff/Appellee,

O. Joseph Williams,
Rachel T. Csar,
PITCHLYNN & WILLIAMS, P.L.L.C.,
Norman, Oklahoma,
and

Robin C. Lash,
GENERAL COUNSEL, MIAMI TRIBE
OF OKLAHOMA,
Miami, Oklahoma,

For Defendant/Appellant.

OPINION BY CAROL M. HANSEN, Judge:

¶1 Defendant/Appellant, Miami Tribe of Oklahoma (Tribe), d/b/a White Loon Construction Company, seeks review of the trial court's judgments against it in favor of Plaintiff/Appellee, Seneca Telephone Company (Seneca), in Seneca's four consolidated small claims cases asserting tort claims arising from Tribe's repeated damage to Seneca's underground telephone lines during excavation on property owned by the Eastern Shawnee Tribe of Oklahoma (Shawnees). Tribe contends the trial court lacked jurisdiction because the doctrine of tribal sovereign immunity preempted state court jurisdiction. We affirm, holding Oklahoma district courts have jurisdiction over tribes for violation of the Oklahoma Underground Facilities Damage Prevention Act because there is no tradition of tribal sovereign immunity in the area of telecommunications regulation and Congress has authorized states to regulate intrastate telecommunication facilities.

¶2 Seneca provides telephone service to a travel plaza, social services center, gaming casino, and housing subdivision owned by the Shawnees. The Shawnees

hired Tribe to perform excavation work. In the course of performing the excavation work, Tribe cut one of Seneca's underground telephone lines three times and another line once.

¶3 Seneca filed a separate small claims affidavit for each incident, seeking \$1,497.90, \$5,152.00, \$4,237.55, and \$3,361.48, respectively, in damages. Tribe filed a motion to dismiss in each action based on sovereign immunity. The trial court denied the motion to dismiss and consolidated the four cases for hearing. After an evidentiary hearing, the trial court entered judgment for Seneca in the amount of \$13,648.93 in damages and \$600.00 in costs. Seneca then applied for attorney fees and costs. Over Tribe's objection based on sovereign immunity, the trial court awarded \$34,655.09 in attorney fees and costs. Tribe appeals from both orders.

I

¶4 Tribe's principal contention is the trial court lacked subject matter jurisdiction because Tribe had sovereign immunity against Seneca's claims. It argues it cannot be sued unless it has waived sovereign immunity or Congress has abrogated Tribe's sovereign immunity, and its sovereign immunity extends to its business entities without regard to whether its activities are commercial or governmental and on or off-reservation, citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc. (Kiowa)*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998). In

Kiowa, the Supreme Court stated, “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” However, the Court noted although the doctrine of tribal immunity was settled law, it developed with little judicial analysis and, under today’s conditions, extends beyond what is needed to safeguard tribal self-governance. The Court stated, “In this [modern] economic context, immunity can harm those who are unaware they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” 523 U.S. at 758, 118 S.Ct. at 1704. The underlying action in *Kiowa* was based on contract, and the Court limited its holding to suits on contracts.

¶5 In *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the Supreme Court applied a preemption analysis in allowing the State of California to require a tribal member who operated a general store on a reservation to obtain a state license to sell liquor for off-premises consumption. It concluded that Congress authorized, rather than preempted, state regulation over Indian liquor transactions. In *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810, the Oklahoma Supreme Court considered whether the plaintiff could sue an Indian tribe and its casino in state district court for dram shop liability. The Court relied on the *Rice v. Rehner* preemption analysis in concluding Oklahoma courts had jurisdiction over a tribe for

dram shop liability because there was no tradition of tribal sovereign immunity in the area of alcoholic beverage regulation and Congress had authorized states as well as tribes to regulate alcoholic beverages.

¶6 Similarly, there is no tradition of tribal sovereign immunity in the area of telecommunications regulation. *e.g.*, *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Comm'n of South Dakota*, 595 N.W.2d 604, 608 (S.D. 1999) (state public utilities commission had jurisdiction over the sale of a telephone exchange located on an Indian reservation). Congress has delegated jurisdiction over interstate telecommunications to the Federal Communication Commission, while reserving to the states jurisdiction over intrastate telecommunication “charges, classifications, practices, services, facilities, or regulations.” 47 U.S.C. §152(a) and (b).

¶7 In the course of regulating telecommunication facilities as well as other public utilities, Oklahoma adopted the Underground Facilities Damage Prevention Act (Act), 63 O.S.2001 §§ 142.1 to 142.12. The purpose of the Act is to protect both the public and the underground facilities. *Oklahoma Natural Gas Co. v. Utility Contractors, Inc.*, 1998 OK CIV APP 132, 964 P.2d 977, 980. The Act provides,

Any excavator who damages or cuts an underground facility, as a result of negligently failing to comply with the provisions of the Oklahoma Underground Facilities

Damage Prevention Act or as a result of failing to take measures for the protection of an underground facility shall be liable to the operator of the underground facility for the repair of the damaged underground facility.

63 O.S.Supp.2003 §142.9a(B). We hold Oklahoma district courts have jurisdiction over tribes for violation of this Act because there is no tradition of tribal sovereign immunity in the area of telecommunications regulation and Congress has authorized states to regulate intrastate telecommunication facilities.

¶8 Our resolution of the jurisdictional issue disposes of Tribe's contention the trial court lacked the power to award attorney fees pursuant to 12 O.S.2001 §940(A).

II

¶9 Tribe's second contention is the trial court erred in failing to apply negligence per se against Seneca, by finding Tribe breached a duty to Seneca, and by granting extraordinary relief to Seneca contrary to the relief contemplated by the Act. Tribe argues Seneca was in violation of the Act and therefore contributed to the damage it suffered. It argues there is no evidence in record establishing it breached any common law duty to Seneca. Tribe also argues an award of damages under the Act is limited to repairs, not replacement and upgrades to the damaged line.

¶10 The evidence at trial showed Seneca had not filed the location of its underground facilities with the one-call notification center as required by 63

O.S.Supp.2003 §142.3. However, Tribe's general manager for its excavation company testified he contacted Seneca directly when he needed lines located, and on the occasions when he had done so, the Seneca representative identified the location of the lines. In addition, he testified regarding the presence of pedestals showing the presence of Seneca's lines. There was no evidence Tribe cut the lines as result of Seneca's failure to list the lines with the notification center.

¶11 "To establish negligence per se on the basis of a statutory violation the party must establish that: 1) the injury was caused by the violation; 2) the injury was of a type intended to be prevented by the statute; and 3) the injured party was of the class meant to be protected by the statute." *Mansfield v. Circle K. Corp.*, 1994 OK 80, 877 P.2d 1130, 1132-1133. Tribe has failed to establish the injury in this case was caused by Seneca's violation of the statute. Rather, the evidence shows the injury resulted from Tribe's violation of the statute in failing to take measures for the protection of an underground facility. Accordingly, the trial court properly held Tribe liable to Seneca for the repair of the damaged underground facility.

¶12 Tribe contends the damages awarded were excessive because Seneca replaced and upgraded some lines instead of merely repairing them. However, the evidence showed Tribe damaged one line three times, and the amount of damages the trial

court awarded was less than the amount Seneca sought for replacing the line. This record supports the damages award.

¶13 For the foregoing reasons, the orders of the trial court are AFFIRMED.

BUETTNER, P.J., and HETHERINGTON, J., concur.