STATE OF MICHIGAN

COURT OF APPEALS

DEAN W. PASHAK and CONNIE E. PASHAK,

Plaintiffs-Counter-Defendants-Appellees/
Cross-Appellants,

v

INTERSTATE HIGHWAY CONSTRUCTION, INC.,

Defendant-Counter-Plaintiff-Appellant/
Cross-Appellee,

and

AUBURN ACQUISITION ASSOCIATES,

Third-Party Defendant-Appellee.

UNPUBLISHED
March 20, 1998

No. 189886
Bay Circuit Court
LC No. 93-003545-CH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Plaintiffs Dean and Connie Pashak sued defendant, Interstate Highway Construction Company, Inc. (IHC), after they discovered concrete and asphalt chunks beneath the surface of their land. Plaintiffs purchased the land from Auburn Acquisition Associates, who had previously leased it to IHC. IHC filed a counter-complaint against plaintiffs and a third-party complaint against Auburn. Following a bench trial, the trial court awarded plaintiffs damages of $160,000, assessed attorney fees against IHC to be shared by plaintiffs and Auburn, and dismissed IHC's counter-complaint and third-party complaint. IHC now appeals as of right and plaintiffs cross appeal. We affirm in part and reverse in part.

Dean Pashak is a builder and developer who owned land adjacent to land owned by Auburn. Auburn leased the five-acre parcel in question to IHC, to be used by IHC as a staging area for a highway repair project. When IHC leased the land from Auburn, it indicated that it would need to

stabilize the site so that its heavy equipment could drive on the surface. Although potential methods of stabilizing were discussed at the lease inception, IHC could not decide which method to employ until it took possession and investigated the soil composition. IHC was required to restore the land to its original condition under the terms of the lease.

IHC ultimately stabilized the site by burying chunks of concrete and bituminous material. Pashak believed that the site had been stabilized with sand and gravel and expressed a desire to purchase the gravel. He obtained a permit from the township to store material at the site. Near the end of the lease period, Pashak observed bulldozers removing material from the site, and, believing that IHC was removing clay subsoil, ordered the removal stopped. A representative of Auburn, which still owned the site, spoke with the site manager regarding the restoration process. The manager understood that he was to replace the topsoil over the stabilizing material. The trial court found that IHC had made an honest mistake in covering the base material.

When Auburn later transferred the property to plaintiffs, it also assigned specific rights under its lease with IHC, including the provision requiring restoration. Although IHC challenges the validity of the assignment as between Auburn and plaintiffs, we find that it lacks standing to do so where the parties to the assignment, Auburn and plaintiffs, do not contest its validity. *Woods v Ayres*, 39 Mich 345; 33 AR 396 (1878). We further find that the trial court did not err in finding that the lease controlled the duties of the parties with respect to restoration. The trial court stated:

> The fact Auburn Acquisition gave IHC permission to pile gravel consistent with the City of Auburn's use permit doesn't relieve the defendant of cleanup or restoration responsibility. It didn't change the situation in any way, because IHC didn't get Mr. Pashak's approval to not restore the property. In the context of the facts of this case, it only meant that, to the extent IHC and Pashak have an agreement to leave some gravel on the property, which has been approved by the City, then it's okay with Auburn Acquisition. It doesn't alleviate, in any way, the defendant's responsibility. It only changes the condition that the property can be left in to the extent that the gravel can be bermed according to the term's of the City's use permit.

These findings are consistent with the evidence at trial and, therefore, are not clearly erroneous. MCR 2.613(C); *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98; 535 NW2d 529 (1995).

Nor did the trial court clearly err in finding that Auburn and plaintiffs were unaware of the presence of the concrete and bituminous stabilizing material beneath the topsoil. Although IHC contends that this finding is contradicted by the logs kept by its site manager, Jeff Ardelean, the trial court did not find the logs to be credible. Furthermore, IHC does not identify on appeal the specific portions of the logs upon which it relies. Accordingly, we consider this portion of IHC's argument to be abandoned. *Dresden v Detroit Macomb Hosp Corp*, 218 Mich App 292; 553 NW2d 387 (1996).

Regarding damages, we find no error in the trial court's decision to measure damages by the cost of restoration of the property, as opposed to diminution in value of the property. Cost of

restoration, even if it exceeds diminution in value, may be awarded when the property in question is unique. See *Schankin v Buskirk*, 354 Mich 490, 494; 93 NW2d 293 (1958). See also *Markstrom v US Steel*, 182 Mich App 570, 575-576; 452 NW2d 820 (1990), rev'd 437 Mich 936; 467 NW2d 310 (1991) (to allow for opportunity for restoration). The trial court found that the property was unique because it was part of a separate parcel to be developed as a subdivision. This finding is supported by the evidence and is not clearly erroneous. The record also supports the trial court's findings and decision regarding the amount of damages relating to restoration. *Wendel v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971); *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154; 561 NW2d 445 (1997).

Next, IHC challenges the trial court's decision to award attorney fees. Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or recognized exception. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994). The decision whether to award attorney fees is within the trial court's discretion and will be reviewed on appeal for abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). A trial court's determination of the reasonableness of the fee will also be upheld on appeal absent an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

Third-party defendant Auburn asserts that its right to attorney fees is contractual, pursuant to Article XV of its lease with IHC. That article states, in pertinent part:

> Furthermore, if any action at law or equity shall be brought . . . to enforce or interpret any provisions of this Lease . . . , the prevailing party shall be entitled to recover from the other party . . . all reasonable attorney fees incurred by the prevailing party . . . .

We disagree with IHC's contention that the foregoing provision entitles Auburn to attorney fees only if it is a plaintiff in an action. The plain language of the lease indicates that attorney fees are recoverable if "any action" at law is brought. Because Auburn was a prevailing party in an action at law, it was entitled to attorney fees under the terms of the lease.

Plaintiffs were also awarded attorney fees under Article XV of the lease. However, while Auburn assigned to plaintiffs certain rights under its lease with IHC, it did not assign the right to attorney fees under Article XV. Thus, unlike Auburn, plaintiffs do not have a contractual right to attorney fees. See *Sanford v Sallan*, 263 Mich 299, 300-301; 248 NW 628 (1933). Plaintiffs further argue that they are entitled to attorney fees as purchasers of the property in question. Plaintiffs essentially argue that all rights of the grantor transferred on the sale of the property, including any rights under Article XV of the lease. We disagree. In this context, the general statute of frauds, MCL 566.106; MSA 26.906, is applicable. To comport with this statute, a writing transferring an interest in land (other than leases not exceeding one year) must be certain and definite with regard to the parties, property, consideration, premises, and time of performance. *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602, 606; 423 NW2d 284 (1988). As noted above, here the interest transferred did not include the

contractual right to attorney fees pursuant to Article XV of the lease. That right belonged only to Auburn. Accordingly, the trial court erred in awarding attorney fees to plaintiffs.

On cross appeal, plaintiffs claim that they were erroneously denied treble damages under MCL 600.2919; MSA 27A.2919. We disagree. The trial court found that IHC acted in good faith, with an honest belief that an agreement had been reached to leave the cement and asphalt on the property, and, therefore, plaintiffs were not entitled to treble damages. The trial court's findings with respect to the conduct of IHC are supported by the evidence and are not clearly erroneous. Finally, plaintiffs' request for double damages under the statute was not addressed by the trial court, thus precluding appellate review of this issue. *Lowman v Karp*, 190 Mich App 448, 454; 476 NW2d 428 (1991).

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer