STATE OF MICHIGAN

COURT OF APPEALS

ERICH M. KEIL and MARIANNE W. KEIL,

Plaintiffs-Appellees/
Cross-Appellants,

v

MICHIGAN LAND TECH, INC.,

Defendant-Appellant/
Cross-Appellee,

and

DONALD A. MOON,

Defendant/ Cross-Appellee.

UNPUBLISHED
October 2, 1998

No. 203249
Livingston Circuit Court
LC No. 94-013669 CH

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendant, Michigan Land Tech, Inc., appeals as of right a judgment awarding plaintiffs $108,507.00, following a jury trial, in this trespass action. Plaintiffs cross-appeal the trial court's decisions denying their motion to treble damages pursuant to MCL 600.2919(1); 27A.2919(1), and granting defendant's motion to dismiss Donald Moon as an individual defendant. We affirm in part, reverse in part, and remand for a modification of the judgment.

The jury found that defendant deliberately and intentionally trespassed on plaintiffs' property and built a pole barn and storage barn on the property, which is adjacent to defendant's golf course. Defendant claimed that the structures were built on plaintiffs' property under the mistaken belief that they were located on its own land. The jury awarded plaintiffs damages for lost rent, tree loss and replacement, environmental study and survey fees, and lost interest. The trial court ruled that defendant was liable for treble damages pursuant to MCL 600.2919(1)(a); MSA 27A.2919(1)(a), with regard to the awards for tree loss and replacement only.

Defendant claims that the trial court abused its discretion by denying its several motions for mistrial and its motion for new trial. The motions were predicated on defendant's claim that plaintiffs' attorney repeatedly attempted to introduce irrelevant, inflammatory, and prejudicial testimony, which had previously been ruled inadmissible. We find no abuse of discretion. The record indicates that the trial court did not permit plaintiffs to introduce inadmissible evidence. In those instances where the court believed that plaintiffs had overstepped the bounds of its evidentiary rulings, the court's cautionary instructions and final instructions to the jury were sufficient to cure any prejudicial effect. In addition, the trial court's instructions to the jury that sympathy and prejudice must not affect their decision and that statements by the attorneys are not evidence were sufficient to cure any prejudice created by plaintiffs' attorney's remarks indicating that this was his first jury trial and that defendant and defense counsel were the more experienced attorneys. The jury was not prejudiced to the extent that defendant was denied its right to a fair trial. *Lamson v Martin (After Remand)*, 216 Mich App 452, 457; 549 NW2d 878 (1996). Further, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on defendant's argument that the cumulative effect of any errors prejudiced the jury against it to the extent that it was denied a fair trial. *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997).

Next, the trial court properly instructed the jury. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997); *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). The trial court correctly stated the law when it instructed the jury that it should determine the proper measure of damages. *Szymanski, supra* at 429-431.

Defendant argues that the award of damages for replacement of trees was improper and constituted a windfall to plaintiffs because, by the time of trial, they had already sold part of the property and the remaining parcel was for sale. Defendant contends that plaintiffs should not be allowed to recover for tree replacement when they had no intention of restoring the property. We disagree. The proper measure of damages is determined by whether the injury is permanent or reparable. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 148-149; 500 NW2d 115 (1993). Moreover, if the injury is reparable, there is no requirement that the plaintiff must continue to own the property at the time of trial, or actually restore the property. The jury's award is not inconsistent with the requirement that damages must compensate the plaintiffs for the harm or damage actually suffered by them. *Id.* at 149. Here, the harm and damage actually occurred. Trees were cut down and destroyed. The land was cleared and flattened. The jury's award is intended to compensate plaintiffs for that damage. Also, the trial court did not abuse its discretion or err as a matter of law when it instructed the jury that it could consider an award of imputed rent. *Tillson v Consumers Power Co*, 269 Mich 53, 67; 256 NW 801 (1934); see, also, *Szymanski, supra* at 430.

Next, viewed in a light most favorable to plaintiffs, the evidence was such that reasonable people could differ as to whether the trespass was intentional and deliberate, as opposed to casual and involuntary. Accordingly, the question was properly left for the jury to decide, and the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict. *Pontiac School Dist*, *supra* at 612; *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395; 493 NW2d 441

(1992). Similarly, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the argument that the verdict was against the great weight of the evidence. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

Next, defendant claims that the trial court abused its discretion in denying its motion for remittitur. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 45; 550 NW2d 809 (1996). We disagree. This claim is based, in part, on defendant's argument that the damage award for tree replacement was improper, an argument that we have already rejected. Remittitur is justified if the jury verdict is "excessive," i.e., the amount awarded is greater than the highest amount the evidence will support. *Palenkas v Beaumont Hospital*, 432 Mich 527, 531-532; 443 NW2d 354 (1989); MCR 2.611(E)(1). After considering the various experts' testimonies regarding damages, we conclude that the jury's awards of damages are supported by the evidence. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for remittitur.

Finally, defendant claims that the trial court abused its discretion when it admitted into evidence an aerial photograph of plaintiffs' property that was taken before the alleged encroachment. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). We conclude that a sufficient foundation was established for admission of the photograph. MRE 901(a) and (b)(1); *Ferguson v Delaware International Speedway*, 164 Mich App 283, 290-291; 416 NW2d 415 (1987). The trial court did not abuse its discretion in admitting the photograph into evidence. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

We next address plaintiffs' issues on cross-appeal. We find no merit to plaintiffs' argument that the entire damage award should be trebled pursuant to MCL 600.2919(1); MSA 27A.2919(1). Upon de novo review, our primary goal is to ascertain and give effect to the intent of the Legislature, construing the statutory language reasonably and keeping in mind the purpose of the statute. *Rose Hill Center, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). We conclude that the purpose and intent of the statute is to provide a special measure of damages (treble damages) to compensate plaintiffs for the lost value of, or costs associated with replacing, resources listed in the statute that have been wrongfully taken or damaged by a trespasser. Cf. *Peaslee v Saginaw Co Drain Comm'r*, 365 Mich 338, 348; 112 NW2d 562 (1961) (because the statute "makes no provision for damages" other than those listed, the lower court correctly concluded that trebling of damages was inappropriate where much of the plaintiff's claim involved "loss of customers and goodwill to the business" as a result of the trespass); *Achey v Hull*, 7 Mich 423, 429 (1859) ("the statute . . . was made to give to the owners of the fee a right to sue, in the form of trespass, for enumerated injuries . . .").[1] The argument advanced by plaintiffs, that all damages however far afield from losses enumerated in the statute should be trebled in any case where even a minimal enumerated loss is proved, goes far beyond the intent of the statute as we understand it. Plaintiffs cite no precedent construing the specific question raised here and certainly none that would allow or suggest this result. We decline to extend the penalty imposed by the statute in this manner. The trial court did not err in denying plaintiffs' motion to treble all damages awarded by the jury.

However, we do find merit in plaintiffs' claim that the trial court erred when it completely dismissed Donald Moon as an individual defendant. The trial court premised the dismissal of Moon on its conclusion that plaintiffs had failed to "pierce the corporate veil." Plaintiffs do not contest that conclusion on appeal but contend that, nonetheless, Moon is jointly and severally

liable for any trespass in which he was personally involved. We agree. *Joy Management Co v Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990); *Attorney General v Ankersen*, 148 Mich App 524, 557; 385 NW2d 658 (1986). The evidence below was uncontroverted that Moon personally drove the bulldozer that cleared a building space by tearing down trees. He is, thus, personally liable for the awards of damages (including interest) resulting from the destruction of the trees and their replacement.

Pursuant to MCR 7.216(A)(7), the order dismissing Donald Moon as a defendant is reversed and this matter is remanded to the trial court, which is directed to modify the judgment to include Donald Moon as a defendant, jointly and severally liable for all damages arising out of the destruction of the trees and their replacement. In all other respects, the decision of the trial court is affirmed. The opposing party, rather than the moving party, was entitled to judgment. MCR 2.116(I)(2).

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] Although *Peaslee* and *Achey* considered the statute prior to amendments in effect at the time of the trespass here, we do not conclude that the amendments affected the intent of the statute with respect to the question raised here.