

STATE OF MICHIGAN
COURT OF APPEALS

RALPH G. HAJJ,

Plaintiff/Counter Defendant-
Appellee,

v

ANDREA ROAT and DAVID ROAT,

Defendants/Counter Plaintiffs-
Appellants.

UNPUBLISHED

April 16, 2002

No. 229838

Oakland Circuit Court

LC No. 99-017747-CH

Before: K.F. Kelly, P.J. and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendants appeal by right from a judgment awarding them actual, rather than treble, damages on their complaint for damages under MCL 600.2919(1)(a). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court granted defendants' motion for summary disposition on their counterclaim, ruling that plaintiff had removed shrubs from defendants property, that the removal was not casual and involuntary, and that plaintiff did not have probable cause to believe that the shrubs were on his land. It therefore found that defendants were entitled to treble damages under the statute and set a hearing to determine actual damages. Following the hearing, the court refused to award treble damages.

Defendants contend that they were entitled to treble damages and the court erred in concluding otherwise, especially given its prior ruling awarding treble damages. Plaintiff contends that the court erred in granting defendants' motion for summary disposition and properly declined to award treble damages. Generally, the failure to file a cross appeal precludes the appellee from raising an issue not raised by appellant. *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999), lv gtd 463 Mich 906 (2000). While a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, it is not necessary to urge an alternative ground for affirmance, even if the trial court considered and rejected that alternative ground. *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998). Because plaintiff did not file a cross appeal, this Court cannot consider whether defendants were entitled to judgment on their trespass claim but can consider whether the trial court properly declined to award treble damages.

Pursuant to statute, a person who cuts down or carries off any wood, underwood, trees, or timber or despoils or injures the trees on another's land without the owner's permission is liable to the owner for treble damages. "If upon trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, . . . judgment shall be given for the amount of single damages only." MCL 600.2919(1)(a).

Under this statute, a plaintiff need not show that a defendant acted with malice or an intent to do injury. *Iacobelli Constr Co, Inc v Western Cas & Sur Co*, 130 Mich App 255, 263; 343 NW2d 517 (1983). However, the trespass must be more than negligent for treble damages to be awarded. *Id.* at 261. Treble damages are only warranted where there is proof of active misconduct, *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982), or a knowing and intentional trespass. *Governale v Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975). Thus the defendant's good faith and honest belief that he possessed the legal authority to commit the complained-of act will preclude liability for treble damages. *Id.* The burden of proof is on the plaintiff to show that the cutting was done without his permission. The burden of proof is on the defendant to prove that the trespass was casual and involuntary rather than wilful. *Stevens, supra.*

Defendants cited to various documents in support of their motion but did not append them to the brief. From the documents actually submitted to the trial court, it is clear that plaintiff plainly admitted that he directed his son to cut down the shrubs. Therefore, reasonable minds could not differ in concluding that the trespass was not casual and involuntary and the trial court did not err in so finding. The question thus remains whether plaintiff had probable cause to believe that the shrubs were on his land. Given that both parties claimed they were told by the same person that the shrubs were on their own property and relied on surveys purportedly showing that the shrubs were within their own lot lines, and that neither party submitted the surveys on which they relied to prove that the shrubs were clearly on their own property, the trial court erred in finding that there was no genuine issue of fact whether plaintiff had probable cause to believe that the shrubs were on his land.

Reversed and remanded for a determination on defendants' claim for treble damages. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh