

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS CARUSO and SHERRI CARUSO,

Plaintiffs-Appellees,

v

HMC MECHANICAL CORPORATION and
LESLIE UPFALL,

Defendants-Appellants.

UNPUBLISHED
December 20, 2005

No. 254954
Genesee Circuit Court
LC No. 00-068257-CH

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

In this slander of title action, defendants appeal as of right following a bench trial in which the trial court awarded plaintiffs \$9,000 in actual damages and \$9,000 in exemplary damages plus \$12,609 in attorney fees and costs. This case involves the recording of two \$11,000 construction liens against two separate residential properties owned by plaintiffs. Defendants HMC Mechanical Corporation, a heating and cooling mechanical contractor, and its president, Leslie Upfall filed the construction liens against plaintiffs' parcels. Plaintiffs alleged that the construction liens were filed without lawful cause in violation of MCL 565.25 and MCL 600.2907a. We affirm.

The trial court awarded \$9,000 in actual damages to plaintiffs pursuant to MCL 600.2907a(1)(a):

(1) A person who violates [MCL 565.25] by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable to the owner of the property encumbered for all of the following:

(a) All of the costs incurred in bringing an action under [MCL 565.25], including actual attorney fees.

(b) All damages the owner of the property may have sustained as a result of the filing of the encumbrance.

(c) Exemplary damages.

Defendants argue that the trial court committed clear error in awarding plaintiffs \$9,000 in actual damages in this case because there was no testimony to corroborate or confirm this amount, other than the testimony of plaintiff Sherri Caruso. Defendants insist the trial court “could not have made a calculation of damages with reasonable certainty.” We disagree.

This Court reviews a trial court’s findings of fact in a bench trial for clear error and its findings of law de novo. MCR 2.613(C); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). This Court also reviews a trial court’s determination of damages following a bench trial for clear error. *Id.* at 513. A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* at 512. In *Berrios v Miles, Inc*, 226 Mich App 470, 478-479; 574 NW2d 677 (1997) (citations omitted), this Court explained the law of damages applicable to this case as follows:

A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. Where injury to some degree is found, we do not preclude recovery for lack of precise proof of damages. *We do the best we can with what we have.* [Emphasis added.]

Furthermore, in considering the credibility of witnesses with regard to damages, this Court will defer to the trial court's superior position to observe and evaluate the witnesses' credibility. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

We find that defendants have failed to demonstrate that the trial court committed clear error in finding \$9,000 in actual damages for plaintiffs. Defendants argument is essentially an assault on the credibility of Sherri Caruso, who testified that she and her husband Dennis incurred \$9,000 in actual damages in the form of interest and penalties on loans, stemming from the liens filed by defendants. What defendants fail to point out, and what the trial court correctly stated in its oral opinion, is that Sherri Caruso’s testimony was all the evidence on damages amount from either side. In other words, although the burden is on plaintiffs to prove their damages, defendants failed to present any evidence or argument to the contrary that plaintiffs did not suffer the amount asserted by Sherri Caruso.

Moreover, a damage award is not clearly erroneous where the damage award was within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, supra* at 516. The evidence was presented in the form of Sherri Caruso’s testimony as to the amount of damages. As the trial court indicated, this is not the best evidence of such damages, but it was sufficient in the trial court’s eyes and we decline to second-guess that decision because the trial judge was in a better position to decide the veracity of the damages testimony. As the *Berrios, supra* at 478, court stated: “We do the best we can with what we have.”

Next, defendants argue that the trial court committed error by awarding plaintiffs \$9,000 in exemplary damages. We disagree. MCL 600.2907a(1)(c) provides in relevant part:

(1) A person who violates [MCL 565.25] by encumbering property through the recording of a document without lawful cause with the intent to harass or intimidate any person is liable to the owner of the property encumbered for all of the following:

* * *

(c) Exemplary damages.

In *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998), this Court, discussing MCL 565.108 and the interplay between statutory slander of title and common law slander of title, stated:

In Michigan, slander of title claims has both a common-law and statutory basis. Slander of title has been recognized at common law since at least 1900 as a remedy for malicious publication of false statements that disparage a plaintiff's right in property. 2 *Cameron, Michigan Real Property Law* (2d ed), *Slander of Title*, § 30.18, pp 1461-1462; *Harrison v Howe*, 109 Mich 476; 67 NW 527 (1896), and *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738; 419 NW2d 746 (1988).

To establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages. *Sullivan v Thomas Organization, PC*, 88 Mich App 77, 82; 276 NW2d 522 (1979); *Michigan Real Property Law*, *supra* at 1461; 50 *Am Jur 2d, Libel and Slander*, § 554, p 847. . . .

The same three elements are required in slander of title actions brought under MCL 565.108; *GKC Michigan Theaters, Inc v Grand Mall*, 222 Mich App 294, 301; 564 NW2d 117 (1997). []

Therefore, MCL 565.108 requires proof of malice, and MCL 565.25(5), by its very language, requires an intent to harass or intimidate. Sufficient evidence must be presented to support a finding of malicious action or outrageous conduct. *Will v Dept of Civil Serv*, 145 Mich App 214, 226; 377 NW2d 826 (1985). Moreover, the damage award is not clearly erroneous where the damage award was within the range of evidence presented, and the trial court was aware of the issues in the case and appropriately applied the law. *Alan Custom Homes, supra* at 516.

In awarding plaintiffs \$9,000 in exemplary damages, the trial court stated: "I'm going to award exemplary damages . . . [because] I feel that number does not unnecessarily punish the defendant for his conduct, but that given the testimony and the scope of the actual damages it is an appropriate number for exemplary damages." Defendants argue that exemplary damages were inappropriate in this case because there was no evidence that Upfall, or his company, HMC

Mechanical, personally filed the liens against plaintiffs and because there was no evidence that the liens were knowingly and falsely published with malice.

Our review of the evidence leads to the conclusion that defendants' argument is without merit and the trial court's award of \$9,000 in exemplary damages was not clearly erroneous. The trial court's relief related to defendants' purposeful inference and malicious filing of construction liens that caused plaintiff to lose control over the funding of their new home. Sherri Caruso described how defendant Upfall had told her he would "tie her ass up in court for three years" and how she believed defendant "didn't care what kind of pain and suffering he was causing me." Moreover, MCL 570.1107(1) permits a construction lien for improvements to real property, on the interest of the owner of the property that is improved. There is nothing in that statute permitting a lien to be placed on property other than that which was improved. According to the uncontradicted testimony of Sherri Caruso, defendants had done no work on the properties to which the liens were attached. She testified about her conversation with Upfall:

And I said, "Les, you didn't do any work on those homes." He said, "well, sue me." I said, "well, I'm gonna have to take you to court." He said, "go right ahead. I'll tie you up [in court] for two or three years."

Based on the above evidence, the trial court's award of exemplary damages was not clearly erroneous.

Defendants' next argument is that defendant HMC Mechanical cannot be liable for damages pursuant MCL 600.2907a because it is not a "person" under the statute. This issue is unpreserved as defendants never raised the issue of whether HMC Mechanical could be liable for damages under MCL 600.2907a. Issues first raised on appeal need not be addressed by the appellate court. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We decline to review this unpreserved issue, which nevertheless clearly has no merit.

Lastly, defendants argue that the trial court awarded excessive attorney fees and costs to plaintiffs and that they were denied a meaningful opportunity to be heard on this question via an evidentiary hearing. We disagree. Attorney fees are reviewed for an abuse of discretion. *In re Costs & Attorney Fees*, 250 Mich App 89, 104; 645 NW2d 697 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *O'Neill v Home IV Care, Inc*, 249 Mich App 606, 612; 643 NW2d 600 (2002), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *Gates v Gates*, 256 Mich App 420, 437-438; 664 NW2d 231 (2003).

Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute or court rule. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 372; 652 NW2d 474 (2002). In this case, MCL 600.2907a(1)(a) specifically authorizes an award for "[a]ll of the costs incurred in bringing an action . . . including attorney fees" for a violation of the statute against filing an unlawful lien.

Defendants do not dispute that attorney fees are awardable in this case, rather defendants argue that the trial court awarded excessive attorney fees and costs to plaintiffs and denied them a meaningful opportunity to be heard on this question. Defendants also argue that the trial court erred in awarding costs and attorney fees to plaintiffs because plaintiffs' bill of costs was not sufficiently detailed and because the trial court failed to hold an evidentiary hearing on the issue of attorney fees and costs.

Generally, a trial court should hold an evidentiary hearing when a party is challenging the reasonableness of the attorney fees claimed. However, if the parties created a sufficient record to review the issue, an evidentiary hearing is not required. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). A trial court's decision that an evidentiary hearing is not warranted is reviewed for an abuse of discretion. *Bielawski v Bielawski*, 137 Mich App 587, 592; 358 NW2d 383 (1984).

In their brief on appeal, defendants assert that they "never waived their right to an evidentiary hearing" and therefore the trial court erred as a matter of law in not conducting an evidentiary hearing. Despite this contention, our review of the record and trial briefs submitted establishes that defendants did not request an evidentiary hearing and therefore forfeited the issue. *Kernen v Homestead Dev Co*, 252 Mich App 689, 692; 653 NW2d 634 (2002). But even if the issue had not been forfeited, plaintiffs' bill of costs and accompanying documentation provided the trial court with a reasonable evidentiary basis to evaluate and decide the issue of costs.

There is no precise formula for determining the reasonableness of an attorney's fee. *Michigan Tax Mgmt Services Co v City of Warren*, 437 Mich 506, 509; 473 NW2d 263 (1991). The following factors may be considered: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. *Id.* at 509-510 (citation omitted).

The record in this case reflects that plaintiffs attached to their motion for attorney fees a detailed three-page listing of the attorney fees charged in connection with this matter. Plaintiffs cited exact dates for work completed, the number of hours worked, and specific details of what the attorney's work entailed. In making its ruling on the question of attorney fees, the court stated the factors considered in determining the reasonableness of the fee. These factors are similar to those listed above in *Michigan Tax Mgmt Services Co, supra* at 509-510. The court then reduced the amount of fees to take into account that certain fees had been included that the court believed should not have been included. Thus, the court carefully considered the actual fees requested by plaintiffs and made appropriate adjustments before making its award. As a result, we find that that an unprejudiced person, considering the facts on which the trial court acted, would not say that there was no justification or excuse for the ruling made. The trial court did not abuse its discretion when it granted plaintiffs attorney fees.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis