STATE OF MICHIGAN

COURT OF APPEALS

ROBERT BOLOGNA and LINDA BOLOGNA,

Plaintiff-Appellees,

v

DENISE PEVARNEK,

Defendant-Appellant.

and

CHESTER DAMIANI and RED CARPET KEIM REALTY,

Defendants.

UNPUBLISHED
November 29, 2007

No. 267244
Wayne Circuit Court
LC No. 04-434504-CZ

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant Denise Pevarnek appeals as of right, challenging the trial court's orders denying her motion to set aside a default and entering a default judgment against her, denying her motion for relief from the default judgment, and denying her motion for sanctions against plaintiffs' counsel. We affirm.

I

A

1

On November 8, 2004, plaintiffs filed this action alleging that defendants trespassed on their land, located at 24850 East River Road, in Grosse Ile, on October 12, 2004, and cut down trees and branches to increase the value of Pevarnek's adjacent property by adding a view of the Detroit River. Plaintiffs alleged that the destruction reduced the value of their property and exposed a view to Pevarnek's unsightly neighboring property. Plaintiffs alleged that Damiani was defendant's agent. Plaintiffs alleged damages in excess of $28,000 and requested that they be trebled, pursuant to MCL 600.2919; thus, they requested damages of $84,000.

2

Pevarnek had signed a purchase agreement on October 4, 2004, to buy the property adjacent to plaintiffs' property, and closed on the purchase on October 28, 2004. The property purchased by Pevarnek (7750 Grosse Ile Parkway), was listed by Red Carpet Keim Realty (Red Carpet), and Chester Damiani was the real estate agent. Damiani had durable power of attorney from defendant regarding the real estate dealings with the property.

B

On November 24, 2004, Gary Fishman, plaintiffs' process server, filed a return of service, stating that on Saturday, November 22, 2004, at 7:22 a.m., he served process (a summons and a copy of the complaint) on Pevarnek at 28765 Brook Circle, Grosse Ile, in addition to interrogatories, a request for admissions, and a request for production of documents. The return of service states that Fishman swore to these facts before Dawn Zielinski, a notary public, on November 22, 2004. Fishman had served Damiani and Red Carpet on November 18, 2004.

Pevarnek did not respond to the summons and complaint.[1] On December 16, 2004, plaintiffs filed an application for default against Pevarnek. Although the court clerk did not sign the "default entry" space on the application, the parties do not dispute that Pevarnek was defaulted.

On January 6, 2005, plaintiff's counsel issued a subpoena to all three defendants to appear at court to testify at deposition on January 26, 2005. The subpoena was sent via certified mail to Pevarnek at 7750 Grosse Ile Parkway.

On January 26, 2005, plaintiffs filed a motion for alternative service of process upon Pevarnek, for service of the subpoena for deposition. The motion stated that Pevarnek's last known address was 7750 Grosse Ile Parkway, and stated that plaintiffs' counsel believed that address was current. Attached to the motion is an affidavit of attempted service by P.C. Petrovich. Petrovich swore that he attempted to serve Pevarnek at 7750 Grosse Ile Parkway on three occasions. On the first, on January 18, 2005, at 4:20 p.m., a young boy said Pevarnek was not home and that he did not know when she would be home. On the second, at 6:25 p.m. later that day, Petrovich got no answer at that address, and left a card, but received no response to the card. On the third, the following day, at 7:25 p.m., Petrovich received no answer at that address. Petrovich concluded that personal service of process could not reasonably be perfected.

Also on January 26, 2005, plaintiffs moved the trial court for a subpoena compelling Pevarnek to appear for deposition. On January 31, 2005, the trial court entered a subpoena to Pevarnek to appear personally for deposition on February 17, 2005. Also on January 31, 2005, the trial court entered an order for alternate service, stating that the court allowed service of the summons and complaint (and a copy of the order) via first class mail to Pevarnek at 7750 Grosse

[1] Red Carpet and Damiani answered the summons and complaint on December 7, 2004.

Ile Parkway, by tacking or firmly affixing to the door at that address, and by certified mail. This order was actually not intended for service of the summons and complaint, but for service of the subpoena for Pevarnek's deposition.

On February 7, 2005, plaintiffs filed a motion for default judgment against Pevarnek. Plaintiffs attached to their motion the application for default, an affidavit of Linda Bologna of substantial length (stating, inter alia, that she noticed that the view of her back yard was suddenly opened up and Pevarnek's unsightly home, located at 7750 Grosse Ile Parkway, was now in full view), an affidavit of Derek Light (who installed a privacy fence for plaintiffs), and an affidavit of Steve McCollum. McCollum swore that the pruning of trees on plaintiffs' property had exposed the view to the neighbors' property to the west, and that the cost of landscape restoration was $24,050.

Linda Bologna further stated that she contacted the police on October 12, 2004, who informed Damiani of the damage that same day. She said that she personally spoke to Damiani on October 13, 2004, who stated that Pevarnek had inquired about a landscaping service to have some of the trees trimmed, and believed that Greg Warren, of Grosse Ile Lawn and Maintenance, did the work. Linda swore that Warren told her that Damiani made the inquiry and that he performed no work. Linda also testified in her affidavit that Pevarnek called her on October 15, 2004, and said she had been informed of the problems and would do what it took to make the situation right. The total actual and statutory (treble) damages (under MCL 600.2919) sought by plaintiffs in their motion were $77,730.

Pevarnek began taking action to defend. On February 11, 2005, plaintiffs filed a renotice of hearing on the motion for default judgment, postponing the hearing to March 11, 2005. The caption for the renotice lists Kenneth J. Camilleri as Pevarnek's attorney. On February 15, 2005, Camilleri filed a general appearance on Pevarnek's behalf.

On February 24, 2005, Pevarnek filed a motion to set aside the default. Pevarnek contended that she was not personally served with the complaint, and that none of the codefendants informed her that she was a defendant. Pevarnek also asserted that she did not cut or remove any trees or branches from plaintiffs' property, did not hire or direct someone to do so, and did not know who did. Pevarnek denied that she told Linda Bologna that she would take responsibility for the damage.

Plaintiffs responded that Pevarnek had long known about the lawsuit. She was informed on October 15, 2004, when she spoke to Linda Bologna that plaintiffs had hired an attorney, was personally served with the complaint in November 2004, was mailed plaintiffs' application for a default in December 2004, and she signed the mail receipt for her deposition subpoena on February 4, 2005. Plaintiffs argued that Pevarnek could not establish good cause to set aside the default. Plaintiffs also argued that Pevarnek did not have a meritorious defense because she was the only one who benefited from the destruction, as she was the only one with an active interest in the property at the time of the destruction, and Damiani would not have been trespassing on plaintiffs' property in the early morning except at Pevarnek's behest.

At the hearing on the motions, Pevarnek argued that good cause was shown because she was not served with process. Pevarnek also argued, inter alia, that her affidavit set forth several meritorious defenses including that she did not own the property on October 12, 2004. Although

she signed the purchase agreement on October 4, 2004, the seller did not sign it until October 13, 2004.

Fishman appeared and testified that he personally served defendant on November 20, 2004. Fishman also identified defendant, sitting in court, as the person he served. When asked to describe defendant's home, Fishman stated that there were front steps to the door and it was surrounded by foliage.

The trial court ruled in plaintiffs' favor, expressly finding that Pevarnek was served, and that Pevarnek did not have a meritorious defense:

> I believe [Pevarnek] was served. And even if she wasn't, I still don't really see a meritorious defense in this case. Because even if she didn't directly cut down the branches and the bushes and whatever trees were involved, she either directed it or had some involvement in it because she was the purchaser of the property and she was the only one to stand to gain from the new view that's created.
>
> And the facts should reflect, I don't think there's much dispute about this, that the plaintiffs' property sits on Grosse Ile, they have a nice river view. . . . And their property also has a number of trees on it that also gave them privacy from the rear and other parts of the house. And these trees that were trimmed or cut down is the only thing—not the only thing, but something that blocked the view of the river from the premises that [Pevarnek] purchased. And in getting a river view, being able to see over to Canada and all of those kind of things, cutting those trees down gave [Pevarnek] that view.

Thus, the trial court denied Pevarnek's motion to set aside the default and granted plaintiffs' motion for a default judgment. The judgment awarded plaintiffs treble damages of $77,730.

On May 12, 2005, Pevarnek filed a motion for relief from judgment under MCR 2.612(C)(1)(c), (e), and (f). Pevarnek argued, inter alia, that she was deprived of a jury trial on damages and of an opportunity to present evidence on damages. In a supplement to her motion, Pevarnek argued that, under MCL 600.6304, she was liable for only the portion of damages that represented her percentage of fault. Thus, she was entitled to have the judgment set aside or its enforcement stayed pending the resolution of the case against the other defendants and a determination by the trial court regarding allocation of fault.

Plaintiffs responded that Pevarnek had not preserved her right to a jury trial because she did not file an answer. Thus, she only had a right to a hearing, which was held on March 11, 2005, at which she chose not to oppose plaintiffs' damages or present any evidence on the issue. Therefore, plaintiffs contended, Pevarnek was not entitled to revisit the damages issue. Plaintiffs further asserted, inter alia, that the only way the trial court could properly stay the default judgment was if defendant posted a bond in the amount of the damages awarded.

The trial court stated that even though Pevarnek and Damiani denied that Pevarnek directed Damiani to cut the trees, it found that claim hard to believe, and circumstantial evidence suggested that Pevarnek did not have a meritorious defense. The trial court denied Pevarnek's

motion, including her request for a stay. On June 6, 2005, Pevarnek filed an (interlocutory) application for leave to appeal, which we denied. *Bologna v Pevarnek*, unpublished order of the Court of Appeals, entered August 2, 2005 (Docket No. 263111).

Meanwhile, on June 3, 2005, the trial court entered a default judgment against Red Carpet. Plaintiffs pursued collection activity against Pevarnek, including garnishments to her employer and bank. On September 28, 2005, the trial court entered an order for administrative closing due to a bankruptcy stay. The order states that the case is closed for administrative purposes, without prejudice, as to Pevarnek only. On November 29, 2005, the trial court entered an order dismissing Damiani with prejudice, pursuant to a stipulation between counsel for plaintiffs and Damiani. On December 16, 2005, Pevarnek filed a claim of appeal with this Court.

II

A

Pevarnek first argues that the trial court abused its discretion in failing to grant relief from the default and the default judgment, because service of process was not effected (causing the trial court to lack personal jurisdiction over Pevarnek), because there was newly discovered evidence (indicating a lack of service of process), and because she presented good cause and a meritorious defense. On each point, we disagree.

1

We review for an abuse of discretion a trial court's decision to grant or deny a motion for relief from judgment. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). We also review for an abuse of discretion a trial court's decision to enter or to set aside a default or default judgment. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999); *Sturak v Ozomaro*, 238 Mich App 549, 569; 606 NW2d 411 (1999). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). This Court reviews for clear error a trial court's findings of fact that support its ruling. MCR 2.613(C). To the extent that the default judgment issue involves questions of court rule interpretation, this Court considers such questions of law de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

Although Pevarnek frames her issues as challenging only the trial court's decision on her motion for relief from judgment, her arguments also address the trial court's denial of her motion to set aside the default. The standard of review, in any event, is the same. *Alken-Ziegler, Inc, supra*.

2

"Although the law favors a determination of a claim on the basis of its merits, the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *ISB Sales Co, supra* at 526. With respect to the entry of defaults and default judgments in civil actions, MCR 2.603 provides, in relevant part:

(A) Entry of Default; Notice; Effect.

(1) *If a party* against whom a judgment for affirmative relief is sought *has failed to plead or otherwise defend* as provided by these rules, and that fact is made to appear by affidavit or otherwise, *the clerk must enter the default of that party*.

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

* * *

(B) Default Judgment.

* * *

(3) Default Judgment Entered by Court. . . . [T]he party entitled to a default judgment must file a motion that asks the court to enter the default judgment.

* * *

(4) Notice of Entry of Default Judgment. The court clerk must promptly mail notice of entry of a default judgment to all parties. The notice to the defendant shall be mailed to the defendant's last known address or the address of the place of service. The clerk must keep a record that notice was given.

* * *

(D) Setting Aside Default or Default Judgment.

(1) *A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed*.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may be set aside only if the motion is filed

(a) before entry of a default judgment, or

(b) if a default judgment has been entered, within 21 days after the default judgment was entered.

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612. [Emphases added.]

Michigan courts construe court rules in the same way that we construe statutes. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001); *Kloian v Domino's Pizza*, 273 Mich App 449, 458; 733 NW2d 766 (2006). "'Well-established principles guide this Court's statutory [or court rule] construction efforts. We begin our analysis by consulting the specific . . . language at issue.'" *Id*., quoting *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 10; 654 NW2d 610 (2002). This Court gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. *Kloian, supra* at 458, citing *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006). If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written. See *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005); *Kloian, supra* at 458. This Court does not interpret a court rule in a way that renders any language surplusage. See *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002); *Kloian, supra* at 458.

The plain language of MCR 2.603(D)(1) indicates that a defendant may seek to set aside a default or default judgment by showing a lack of personal jurisdiction, but that absent such a showing, a defaulted defendant must both show good cause and file an affidavit of facts indicating a meritorious defense. Here, Pevarnek fails to satisfy these requirements, for the reasons discussed below.

"The good cause requirement of MCR 2.603(D)(1) may be satisfied by demonstrating a *procedural irregularity or defect or a reasonable excuse* for failing to comply with the requirements that led to the default judgment." *ISB Sales Co, supra* (emphasis added). "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Alken-Ziegler, Inc, supra* at 233-234.

MCR 2.612(C) states:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) *Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).*
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.
>
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; *or it is no longer equitable that the judgment should have prospective application.*

(f) Any other reason justifying relief from the operation of the judgment. [Emphasis added.]

Pevarnek filed her motion for relief from judgment pursuant to subsections MCR 2.612(C)(1)(b), (c), (e), and (f).

3

Pevarnek asserts various bases challenging the trial court's refusal to set aside the default and default judgment.

a

First, Pevarnek argues that the trial court abused its discretion in refusing to set aside the default judgment, because plaintiffs' complaint failed to state a cause of action. We disagree.

The complaint does not fail to state a cause of action. The complaint contains well-pleaded allegations of fact stating a trespass claim. For example, the complaint states:

> On or about October 12, 2004, Defendants wrongfully and unlawfully trespassed on Mr. and Mrs. Bolognas' property, intentionally and maliciously destroying, cutting and removing over 265 limbs and branches from Plaintiffs' trees and cutting down and removing two large cedar trees . . . .

The complaint also alleges that the purpose of the cutting was to enhance the value of the property listed by Red Carpet and Damiani, and purchased by Pevarnek, by adding a water view. The complaint is precise, concise and specific. On the particular pleadings before us, we hold that the complaint does not fail to state a claim on which relief may be granted. (Regarding whether such a failure would be sufficient to set aside the default or default judgment, see below.)

b

Pevarnek next argues that the trial court clearly erred in making factual findings that an agency relationship existed of sufficient scope that Pevarnek could be held liable for Damiani's actions, and that the trial court abused its discretion in failing to set aside the default judgment on this basis. We disagree.

In this regard, Pevarnek first argues that the complaint alleged no agency relationship between her and Damiani. We disagree. The complaint alleged: ". . . Defendant Pevarnek purchased the property through her agent, Defendant Damiani." Thus, the complaint alleged that an agency relationship existed between Damiani and Pevarnek. Further, the complaint alleged that defendants committed the trespass. It did not allege that Damiani alone committed the trespass.

Pevarnek contends that where a complaint would have been subject to dismissal under MCR 2.116(C)(8), a default judgment entered on such complaint must be set aside. However, since we have found that the complaint in this case in fact did state a viable cause of action, we need not address this claim.

Pevarnek further argues that the trial court abused its discretion in refusing to set aside the default judgment, because the trial court made a finding of fact (that Damiani was acting as Pevarnek's agent) lacking in evidentiary support. We disagree. The bases for setting aside a default judgment do not include that it was based on a finding of fact that has weak evidentiary support. MCR 2.612(C). A default judgment is not a judgment from a trial, with conflicting evidence and fact-finding. Quite the contrary; it is a judgment entered because a defendant's failure to defend has *prevented* a trial (with fact-finding) or other procedure for resolving the dispute. MCR 2.603(A)(1).

c

Next, Pevarnek argues that the trial court made clearly erroneous factual findings that a river view was created and that only Pevarnek had something to gain from the alleged trespass. Pevarnek argues that the trial court abused its discretion in failing to set aside the default judgment. The only authority cited by Pevarnek in support of this argument is *People v Johnson*, 382 Mich 632, 649; NW2d (1969), which states that arguments of counsel are not evidence.

We reject Pevarnek's argument. While it is true that arguments of counsel are not evidence, Pevarnek cites no authority to the effect that factual findings by a trial court that have weak evidentiary support are a sufficient basis requiring a setting aside of a default judgment. Pevarnek's theory would render MCR 2.603 and MCR 2.612(C) surplusage. Therefore, we must reject Pevarnek's argument. See *Pohutski, supra* at 684. Moreover, we defer to the credibility determinations of the fact finder.

In addition, even if Pevarnek is correct that she was not the only person who stood to gain from the trespass and destruction of trees, this fact does not establish both good cause and a meritorious defense sufficient to set aside the default judgment, MCR 2.603(D)(1).

d

Pevarnek argues that the trial court abused its discretion in denying relief from the default judgment because the trial court lacked jurisdiction over her (i.e., personal or "in personam" jurisdiction), because, in light of newly discovered evidence, she was not served with process. This argument also lacks merit.

(i)

First, by making a general appearance in the action below (failing to file a limited appearance only for the purpose of challenging jurisdiction), Pevarnek submitted to the court's jurisdiction. *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993) (a defendant "who enters a general appearance and contests a cause of action on the merits submits to the court's jurisdiction and waives service of process objections"). Accordingly, the trial court did not err in concluding that it acquired personal jurisdiction over Pevarek. Therefore, the trial court's decision to deny Pevarnek's motions to set aside the default and default judgment was not an abuse of discretion.

(ii)

Alternatively, we find that the trial court did not clearly err in finding, as a fact, that Pevarnek *was* served with process. In connection with this holding, we hold that the trial court did not abuse its discretion in denying relief from the default judgment on the basis of newly discovered evidence.

Fishman filed a proof of service swearing that he served Pevarnek on Saturday, November 20, 2004, at 7:22 a.m. Fishman also testified live below and identified Pevarnek in court as the person he served. In response, Pevarnek presented (in conjunction with her motion for reconsideration regarding the trial court's decision not to set aside the default), a revised affidavit stating that she was out of town at the time of the alleged service. Pevarnek also presented an affidavit from Eugene Campbell, indicating Pevarnek was with him at the time process was allegedly served. Pevarnek also attached, to her reply brief for her motion for relief from judgment, Fishman's criminal history, including convictions for crimes involving dishonesty. This criminal history is the (allegedly) newly discovered evidence.

Pevarnek argues that her evidence presented below proves that she was not served with process, and that she was therefore entitled to relief from judgment under MCR 2.612(C)(1)(b) on the basis of newly discovered evidence (the evidence of Fishman's convictions). We disagree.

In order to be granted relief on the basis of newly discovered evidence, the newly discovered evidence must not have been discoverable through due diligence in time to have moved for a new trial under MCR 2.611(B). MCR 2.612(C)(1)(b). MCR 2.611(B) states that a motion for a new trial must be made within 21 days after the judgment is entered. Thus, in order to be considered newly discovered, the information must not have been discoverable through due diligence before April 1, 2005, 21 days after the default judgment was entered on March 11, 2005.[2] We are presented with no substantial reason why Fishman's criminal history could not have been discovered through due diligence before April 1, 2005. Therefore Pevarnek did not establish newly discovered evidence as a basis for relief from the default judgment.

Although Campbell's affidavit and Pevarnek's revised statement were filed with the trial court on March 23, 2005, they were subject to the trial court's credibility assessment. The trial court credited Fishman's sworn proof of service, in-court testimony and in-court identification, and disbelieved Pevarnek and Campbell. We respect the province of the trier of fact (here, the trial court judge) to make credibility determinations, which this Court affords great deference. *In re Clark Estate*, 237 Mich App 387, 395-396; 603 NW2d 290 (1999). In accordance with this respect and deference, we find that the trial court did not clearly err in concluding that Pevarnek *was* served with process (and that the trial court thereby acquired personal jurisdiction over her). Therefore, the trial court did not abuse its discretion in denying relief from the default judgment on the basis of lack of service of process.

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[2] This timeframe comports with the time limitation for moving to set aside a default judgment. MCR 2.603(D)(2)(b).

Because the assertion of lack of personal jurisdiction was without merit, Pevarnek was required to show both good cause and a meritorious defense in order to have the default set aside. MCR 2.603(D)(1). Pevarnek asserted no other bases for good cause. Therefore, the trial court's denial of Pevarnek's motion to set aside the default was not an abuse of discretion.

e

By arguing that the trial court clearly erred in finding that there was an agency relationship between Pevarnek and Damiani, and in finding that a water view was created by the destruction of the trees, Pevarnek is challenging the trial court's conclusion that Pevarnek had no meritorious defense. But as just noted, Pevarnek does not challenge the trial court's decision that she had no good cause. Therefore, the issue of whether she had a meritorious defense is moot, because Pevarnek failed to meet one of the two non-jurisdictional requirements for setting aside a default (i.e., the good cause requirement). Thus, even if the trial court erred in finding that Pevarnek had not shown a meritorious defense, it did not abuse its discretion when it denied Pevarnek's motion to set aside the default.

B

Pevarnek next argues that the trial court abused its discretion in failing to grant relief from the default judgment, because the trial court made several erroneous decisions regarding damages. We reject Pevarnek's arguments.

1

This Court reviews de novo whether defendant had a right to a jury trial on the issue of damages. *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 311; 612 NW2d 826 (2000). This Court also reviews de novo questions of statutory interpretation. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

2

a

Pevarnek argues that the trial court abused its discretion in failing to grant relief from the judgment on the grounds that it was error not to hold a trial on damages. We disagree.

A default settles the issue of liability, but not damages. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). Under *Mink v Masters*, 204 Mich App 242, 246; 514 NW2d 235 (1994), "once one party has filed a jury demand, all other parties may rely on that jury demand and need not independently file their own demand for a jury trial."[3] See also *Marshall Lasser, PC v George*, 252 Mich App 104, 106; 651 NW2d 158 (2002). In this case, plaintiffs filed a jury demand. MCR 2.508(B)(1). Thus, Pevarnek had a right to rely on it.

Entry of a default or default judgment does not waive the defaulting party's right to a jury trial on damages. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 554; 620 NW2d 646 (2001). Rather, Pevarnek had to specifically waive her right. *Mink, supra* at 247. She did not.

However, Pevarnek only had a right to a jury trial *if* a hearing on damages was held. *Zaiter, supra* at 554, 556. In this case, a hearing on the damages issue was not held. The March 11, 2005, hearing was on the parties' motions. Therefore, Pevarnek was not entitled to a jury trial on damages. In default cases, whether to hold a hearing on damages is within the trial court's discretion. MCR 2.603(B)(3)(b) (if it is necessary for the court to determine damages, it *may* conduct a hearing); *Wood, supra* at 486. Pevarnek does not argue that the trial court abused its discretion in not holding a hearing. Pevarnek only argues that the trial court erred in failing to give her an opportunity to contest the damages. But Pevarnek could have contested damages at the March 11, 2005, hearing, or in a motion in opposition to plaintiffs' motion for entry of default judgment. Pevarnek did not do so. Thus, Pevarnek had an opportunity to contest damages, but failed to do so.

b

Pevarnek next argues that the trial court abused its discretion in failing to grant relief from the judgment on the grounds that the trial court applied the wrong measure of damages. Pevarnek argues that the cost of replacement measure of damages was inappropriate because the requirements for using that method were not met. We disagree.

The law is:

> Where the wrong consists of a trespass to property resulting in an injury to the land, the general measure of damages is the diminution in value of the property if the injury is permanent or irreparable. *If the injury is reparable, or temporary, the measure of damages is the cost of restoration of the property to its original condition*, if less than the value of the property before the injury. The rule is, however, flexible in its application. The ultimate goal is compensation for the harm or damage done. Thus, whatever method is most appropriate to compensate a plaintiff for the loss may be used. [*Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993) (citations omitted; emphasis added).]

Given that plaintiffs' trees could be restored, it was proper for the trial court to use the cost-of-restoration method. Use of the cost-of-restoration method was not outside the range of reasonable and principled outcomes. *Saffian, supra* at 12. Accordingly, the trial court did not abuse its discretion in failing to grant relief from the judgment based on the measure of damages used.

c

Pevarnek next argues that the trial court abused its discretion in failing to grant relief from the judgment on the grounds that the trial court erred by adopting without question the assertion of alleged damages without sufficient foundation. We disagree.

Plaintiffs submitted to the trial court the affidavit of Steve McCollum, who swore that, in order to return the property to its pretrespass condition, i.e., no view of defendant's property, 12 new trees had to be planted, some existing trees had to be replanted, the over-pruned trees had to be removed, and the lawn had to be repaired. He stated that the total cost of this work was $24,050. The trial court awarded plaintiffs damages of $77,730. This amount was equal to three times the sum of the cost of work proposed by McCollum and $1,860 for the cost of the privacy fence. In other words: ($24,050 + $1,860) x 3 = $77,730.

Pevarnek argues that the trial court erred in accepting plaintiffs' "expert's" affidavit regarding damages without inquiring how he calculated the damages. We disagree. McCollum stated that he was a graduate forester and the president and owner of Floral City Tree Service. He personally viewed plaintiffs' property, assessed plaintiffs' needs, specifically listed the work to be done, and listed the cost for his business was to complete it. Thus, McCollum put forth a reasonable basis for his computation, which is sufficient. *Berrios v Miles, Inc*, 226 Mich App 470, 478-479; 574 NW2d 677 (1997).

Furthermore, as a forester and owner of a tree service, McCollum had independent knowledge of the cost of the work. Therefore, the trial court did not abuse its discretion when it did not require McCollum to give in-court testimony regarding his damages assessment. The trial court did not abuse its discretion in failing to grant relief from the judgment on the grounds that the trial court adopted the alleged damages without sufficient foundation.

d

Pevarnek next argues that the trial court abused its discretion in failing to grant relief from the judgment on the grounds that the trial court erred in refusing to allocate damages based on percentage of fault. Defendant argues that the trial court should have at least stayed enforcement of the default judgment until the liabilities of the other defendants and their percentages of fault were decided. We disagree.

MCL 600.2957(1) states:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section *by the trier of fact* and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action. [Emphasis added.]

MCL 600.6304 states, in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or section 2955a or 6303, and shall enter judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under section 6312.

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

In their complaint, plaintiffs alleged that Chester Damiani was the agent of Pevarnek and Red Carpet Keim Realty. Further, plaintiffs alleged that defendants wrongfully trespassed on plaintiffs' property and caused property damage. Thus, Pevarnek could be liable either as an actual trespasser or vicariously liable as the principal of the actual trespasser. The entry of default against Pevarnek established Pevarnek's liability. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). Further, Pevarnek is directly responsible for her own share of comparative fault and is vicariously liable for Damiani's share. See *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 650-651; 649 NW2d 23 (2002); see also Restatement Torts, 3d Apportionment of Liability, § 13, p 113 ("A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other . . . ."). As such, even if Pevarnek were entitled to an apportionment of fault, under the facts of this case, she would be liable for 100% of the damages. Consequently, the trial court did not err in refusing to allocate fault.

We agree with plaintiffs' argument that Pevarnek, as Damiani's alleged principal, is responsible (vicariously liable) for all harm caused by him. *McClaine v Alger*, 150 Mich App

306, 316-317; 388 NW2d 349 (1986) ("Vicarious liability is based upon principal-agent and master-servant relationships and involves the imputation of [fault] of the agent or servant to the principal or master without regard to the fault of the principal or master"); see also *Campbell v Kovich*, 273 Mich App 227, 234; 731 NW2d 112 2006) ("the employer may be vicariously liable [for the acts of the agent] under the principles of master and servant" (internal quotation marks and citation omitted)). Where there is an agency relationship between or among defendants, a common liability for a unitary injury should exist. MCL 600.2956 expressly states that "this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee." See *Laurel Woods Apartments v Roumayah*, ____ Mich App ____ , ____ ; ____ NW2d ____ (2007). This language strongly implies that a principal and her agent can both be liable for the unitary damage caused by the agent, even if they are not considered joint tortfeasors. *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 568; 484 NW2d 408 (1992) (holding that a "principal sued solely on the theory of vicarious liability for the [fault] of its agent under the doctrine of respondeat superior" is not a joint tortfeasor), citing *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483; 424 NW2d 478 (1988).

Therefore, we hold that the trial court did not abuse its discretion in refusing to set aside the default judgment by reason of the failure to allocate fault.

e

Pevarnek next argues that the trial court abused its discretion when refusing to grant relief from the default judgment because the damages were excessive. Pevarnek argues that Linda Bologna's testimony that the affected area was not maintained is evidence that the damages were excessive. We disagree.

Linda Bologna testified that the grass in the affected area was not mowed because the area was too dense with trees and thus, she agreed that plaintiffs' "care" of the area was "nonexistent." However, the purpose of the tree line was to provide privacy so that plaintiffs could not see Pevarnek's property. Therefore, that plaintiffs let the area grow uninhibited does not appear inconsistent.

Pevarnek next argues that the evidence did not support the trebling of damages because plaintiffs admitted that the intrusion was accidental. We disagree.

MCL 600.2919(1) provides:

> Any person who:
>
> (a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or
>
> (b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or
>
> (c) cuts down or carries away any grass, hay, or any kind of grain from another's lands without the permission of the owner of the lands, or on the lands or commons of any city, township, village, or other public corporation without

> license to do so, is liable to the owner of the land or the public corporation for 3 times the amount of actual damages. If upon the 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, or that the wood, trees, or timber taken were taken for the purpose of making or repairing any public road or bridge judgment shall be given for the amount of single damages only.

A defendant bears the burden of proving the applicability of single damages. *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982).

First, unless plaintiffs concede on appeal that the intrusion was "casual and involuntary," which they do not do, we see no basis for relief. Plaintiffs' most favorable assertion on appeal is that Pevarnek and Damiani had no idea where the property line was. But they specially argue on appeal that the intrusion was neither casual nor involuntary. Second, the representations cited by Pevarnek were made in plaintiffs' response to Pevarnek's interlocutory application for leave to appeal in Docket No. 263111, which is not part of this record. Third, Linda Bologna specifically testified that she did not believe that the trespass was accidental.

Treble damages under MCL 600.2919 are inappropriate were the trespass was merely negligent, *Iacobelli Constr Co, Inc v The Western Cas & Surety Co*, 130 Mich App 225, 262; 343 NW2d 517 (1983), and a trespasser's good-faith and honest belief that he possessed the legal authority to commit the complained-of act is sufficient to avoid treble damages, *Governale v Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975). But Pevarnek presented no evidence that the intrusion was casual and involuntary, or that she had cause to believe the property was hers. Damiani purposely cut the trees and never testified that he had cause to believe he was on Pevarnek's property. Thus, the trial court did not abuse its discretion in failing to grant Pevarnek relief from the judgment for treble damages.

Pevarnek further argues that the cost of plaintiffs' fence was improperly included as part of the trebled damages. Pevarnek does not explain why. The fence was erected in order to obscure plaintiffs' view of Pevarnek's unsightly property caused by the tree destruction. And not all of the damaged trees were part of McCollum's estimate on cost of replacement—only the most severely damaged ones. Accordingly, we do not believe that the trial court clearly erred in including the cost of the fence in plaintiffs' damages award.

Pevarnek also argues that the damages were excessive because the trebled amount was essentially punitive. This argument is true, as far as it goes. Treble damages are punitive in nature. *Stevens, supra* at 509. But they are authorized by law. MCL 600.2919.

C

Pevarnek next argues that the trial court clearly erred in failing to find a violation of MCR 2.114, and abused its discretion by refusing to consider and award sanctions against plaintiffs thereunder. We disagree.

1

This Court reviews for clear error a trial court's decision whether to impose sanctions under MCR 2.114. *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

2

Pevarnek argues that the trial court should have sanctioned plaintiffs' attorney, Todd W. Grant, for factual misrepresentations made to the trial court. MCR 2.114 states, in pertinent part:

> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.
>
> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

MCR 2.114(D)(2) states that by signing documents submitted to the trial court, the signer certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Pevarnek's argument focuses on alleged factual misrepresentations made by Grant. Therefore, the question is whether Grant could have had a good-faith belief that the facts were true.

Pevarnek first argues that, despite evidence to the contrary, Grant continued to assert in plaintiffs' response to Pevarnek's motion for relief from judgment that Pevarnek instructed Damiani to cut the trees or approved his actions, Pevarnek received a hearing on the issue of damages, and there was a river view from Pevarnek's property created by the tree cutting. Damiani's and Linda Bologna's depositions were taken on March 16, 2005, and plaintiffs' response to Pevarnek's motion for relief from judgment was filed on March 17, 2005.

Pevarnek asserts that Damiani's deposition testimony clearly indicated that Pevarnek did not instruct him to cut the trees and she did not give her approval. Grant asserted in plaintiffs' response that "Damiani was acting with [Pevarnek's] full permission and knowledge." Damiani testified that Pevarnek did not instruct him to cut the trees, but she did ask him to help her clean up the property, and that Pevarnek was present after he cut the trees and helped him clean up the debris. Based on Damiani's testimony and his inherent credibility in plaintiffs' view, Grant made a reasonable argument that Pevarnek instructed or approved of the destruction.

In regard to the river view, Grant stated in plaintiffs' response that the effect of the tree destruction was to give a water view from Pevarnek's property across plaintiffs' property. Linda Bologna testified that, based on a picture she was shown, one could see the water from Pevarnek's front yard. But she stated that the view she believed enhanced Pevarnek's property value was that from the property line. Whether the view was large or small, Linda Bologna

testified that water could be seen from Pevarnek's property. Grant's statement was not a misrepresentation of the facts.

Grant also stated in plaintiffs' response that Pevarnek had plenty of assets to pay the judgment. He based this statement in part on Pevarnek's ability to afford two attorneys, purchase a $340,000 house, and her upper-level employment position. Grant admitted that a creditor's exam had not been conducted, but stated that Pevarnek's background had been investigated. Grant's assessment of Pevarnek's financial situation was reasonable. Grant further stated, "On information and belief, [Pevarnek] recently received a large settlement in a lawsuit from her employer." Pevarnek asserts that this was untrue. However, the question is whether Grant misrepresented known facts. He stated that based on a background check, he believed the information to be true. This was all that was required under MCR 2.114(D).

Lastly, Pevarnek takes issue with Grant's statement at the March 11, 2005, hearing that plaintiffs believed, based on their investigation, that Pevarnek's teenage son helped cut the trees. Pevarnek notes that her son is physically unable to pick up anything and cites Damiani's deposition testimony. But Damiani's testimony occurred after the hearing, and there is no evidence to suggest that Grant knew the boy's physical condition before the hearing. Accordingly, the trial court did not clearly err in finding no basis to impose sanctions on Grant under MCR 2.114 (E) and (F).

III

The trial court did not abuse its discretion in refusing to set aside the default and default judgment. The trial court did not clearly err in finding no basis to impose sanctions on plaintiffs' counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder

I concur in result only.

/s/ Brian K. Zahra