STATE OF MICHIGAN

COURT OF APPEALS

CVETKO ZDRAVKOVSKI a/k/a STEVE ZDRAVKOVSKI,

Plaintiff/Counter-Defendant-Appellee,

and

TATIJANA ZDRAVKOVSKI,

Plaintiff,

v

GAN GONY, INC. and RANDA KANDALAFT,

Defendants-Appellants,

and

ANTOINE KANDALAFT,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
September 30, 2010

No. 291735
Wayne Circuit Court
LC No. 01-119364-CH

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

This property dispute involving an approximate 3.7-foot strip of land, which is part of a lot owned by plaintiffs, but on which part of defendants' building is situated, is before this Court for the third time. In the first appeal, this Court reversed an order granting defendants' motion for summary disposition and denying plaintiffs' motion for summary disposition. *Zdravkovski v Gan Gony, Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 13, 2004 (Docket No. 246392) ("*Zdravkovski I*"). This Court determined that defendants' building encroached on plaintiffs' property and remanded for a determination of an appropriate remedy. *Id*. In the second appeal, this Court vacated the trial court's judgment awarding plaintiffs $5,000 after the court sua sponte granted plaintiffs summary disposition. *Zdravkovski v Gan Gony, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2007 (Docket

Nos. 270203 and 270429) ("*Zdravkovski II*"). This Court remanded the case for trial regarding the appropriateness of injunctive relief or other remedies, including damages, if any, that plaintiffs could prove. *Id*. Following a bench trial on remand, the trial court denied plaintiffs' request for injunctive relief, but awarded plaintiffs damages of $7,144, plus costs and interest of $3,835.06, for a total judgment of $10,979.06. Defendants appeal as of right. We affirm in part, vacate in part, and remand for further proceedings.

I. ENCROACHMENT DAMAGES

We first consider defendants' challenge to the trial court's award of $4,044 for the value of plaintiffs' property encroached by defendants' building and paved asphalt area. Specifically, the encroachment consists of (1) an approximate area of 30 feet by 3.7 feet on which defendants' building sits, and (2) an approximate area of 40 feet by 3.7 feet that defendants covered with asphalt.

We review a trial court's findings of fact at a bench trial for clear error and review its conclusions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000); see also MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Walters*, 239 Mich App at 456. Our review is limited to the record presented to the trial court at the time of trial. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

There is merit to defendants' argument that the trial court applied an incorrect measure of damages to value the encroached area at $4,044. The goal in assigning a value to encroached property is to compensate the encroachee for the harm or damage done. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). Although not an inflexible rule, where the injury caused by a trespass is temporary and reparable, the cost of restoring property to its original condition may be an appropriate measure of general damages.[1] *Id*. A valuation measure may be used where the injury is physically permanent or is likely to continue indefinitely and, therefore, may be deemed "permanent." *Id*. An appropriate measure of general damages where the trespass is permanent is the "diminution of value of the property itself as represented by the value of the property without the encroachment, minus the value of the property with the encroachment *or, alternatively, the value of the strip of land on which the building sits.*" *Kratze*, 442 Mich at 150 (emphasis added).

Here, the trial court valued the disputed property at $16 a square foot, which was the price defendant Antoine Kandalaft claimed he paid when he purchased his improved lots in 1998. Thus, the trial court included both building and land components in its valuation of the injury to plaintiffs' property. With respect to the portion of the disputed area that is occupied by

[1] General damages are those that the law implies accrued from the wrong. *Kratze*, 442 Mich at 148. Special damages are also permitted if they are pleaded and proved. *Id*.; see, also, MCR 2.112(I); *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 590; 735 NW2d 644 (2007).

defendants' building, there was no evidence that plaintiffs had invested in the building or had any use for it. Because the harm to plaintiffs in the area occupied by the building is their lack of access to the land, we conclude that the trial court incorrectly included a building component in the measure of damages.

We reach this same conclusion with respect to the asphalt-covered portion of the disputed area, which the trial court also valued at $16 a square foot. The trial court's award of damages for this portion of the property is also problematic because the court separately awarded plaintiffs $2,100 to replace the asphalt with concrete, to remedy a problem with water drainage that the court found was caused when defendants installed the asphalt. A trial court is not precluded from determining encroachment damages using more than one method. See *Schankin v Buskirk*, 354 Mich 490, 494; 93 NW2d 293 (1958). But absent a finding that defendants would continue to trespass over the asphalt-paved area in such a manner as to create a permanent injury, notwithstanding plaintiffs' ability to access that land and make repairs, it would not be appropriate to use valuation as a method of compensating plaintiffs.

Accordingly, we vacate the portion of the trial court's judgment that awards plaintiff $4,044 for the value of plaintiffs' land being encroached and we remand to the trial court for reconsideration of the proper measure of damages without the building component. On remand, the trial court shall also determine whether any injury with respect to the asphalt-covered portion of the disputed property is permanent and, if so, to tailor the measure of damages to that injury. The trial court may amend its findings or render new findings regarding these components of damages, and amend the judgment accordingly. Cf. MCR 2.611(A)(2)(c) and (d).

We have also considered defendants' arguments regarding the trial court's award of $2,100 to repair the asphalt and $1,000 to repair damage to tiles in plaintiffs' building caused by improper water drainage over the asphalt-paved area. We find no basis for relief with respect to these awards. Defendants do not adequately address these awards in their brief. This Court need not consider an issue that is given only cursory treatment by an appellant. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009). "The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Further, defendants have not shown that they objected at trial to plaintiffs' exhibit evidence regarding these damages, let alone any basis for excluding the exhibits. Thus, we decline to consider defendants' claim of evidentiary error. *McIntosh*, 282 Mich App at 485.

Limiting our review to whether the trial court clearly erred in finding that the asphalt paving led to improper water drainage that damaged plaintiffs' building, defendants have not established any basis for disturbing the trial court's findings. The trial court's findings are supported by the testimony of plaintiff Cvetko Zdravkovski. We give deference to the trial court's assessment of the credibility of the witnesses who appeared before it. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). In light of Cvetko Zdravkovski's testimony, along with the photographs and other evidence introduced at trial, we are not left with a definite and firm conviction that the trial court erred in finding that defendants' asphalt-paving work caused a reparable injury, or in determining the amount of damages to repair plaintiffs' property and to correct the water drainage problem. Therefore, we affirm the award of $3,100 for these items.

II. COSTS

Defendants challenge the trial court's award of taxable costs of $430 to plaintiffs. Contrary to what defendants argue, the trial court did not award costs as a case evaluation sanction under MCR 2.403(O). Instead, taxable costs are governed by MCR 2.625, which allows the prevailing party to tax costs. Defendants do not present any argument explaining why costs were not appropriate under this rule. Defendants' failure to address this necessary issue precludes relief on appeal. *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

III. PREJUDGMENT INTEREST

Defendants also rely on the case evaluation rule, MCR 2.403(O), to challenge the trial court's award of prejudgment interest of $3,405.06. However, an award of prejudgment interest is governed by MCL 600.6013. Because defendants do not address that statute, they have not established any error in the trial court's award or calculation of prejudgment interest. But because we are remanding this case for further proceedings regarding damages, and a new damage award will affect the appropriate amount of prejudgment interest, the trial court shall modify its interest award on remand consistent with any change in the award of damages.

IV. ATTORNEY FEES

Defendants also challenge the trial court's provision for an award of attorney fees in the judgment. A postjudgment order awarding or denying attorney fees is appealable as of right. See MCR 7.202(6)(iv) and MCR 7.203(A)(1). But to invoke this Court's jurisdiction, the trial court must determine the amount of attorney fees. *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 164-167; 712 NW2d 731 (2005). In this case, the judgment did not actually award any attorney fees. Absent such an award, this Court lacks jurisdiction to consider this issue.

V. DEFENDANTS' REQUEST FOR ACTUAL COSTS

Defendants also assert that they should be awarded attorney fees or other costs based on plaintiffs' refusal to settle the case. This issue is not properly before us because it is not set forth in defendants' statement of the issues presented, contrary to MCR 7.212(C)(5). *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). Although this Court has discretion to consider an issue in a nonconforming brief, *Van Buren Twp v Garter Belt Inc*, 258 Mich App 594, 632; 673 NW2d 111 (2003), we decline to do so in this case because (1) defendants have not shown that they filed an appropriate motion requesting such costs in the trial court, and (2) defendants' cursory argument on appeal fails to disclose the particular ground or grounds on which they rely to support their request for costs. This Court need not consider an issue that is given only cursory treatment by an appellant. *McIntosh*, 282 Mich App at 485.

VI. EQUITABLE RELIEF

Finally, defendants argue that the trial court erred by failing to consider equitable relief in the form of reforming an earlier deed for the property such as to grant them title to the entire disputed strip of land. Defendants' reliance on the balancing test in *Kratze*, 443 Mich at 143-

144, in support of their argument is misplaced because that test is directed at the propriety of injunctive relief in favor of the encroachee. Here, the trial court denied plaintiffs' request for injunctive relief. To the extent defendants' argument is directed at the trial court's refusal to address their request for a transfer of title, this Court determined in *Zdravkovski I*, slip op at 3-4, that "plaintiffs are the rightful owners of the east 3.7 feet of lot 1106." Under the law of the case doctrine, this Court's decision in *Zdravkovski I* is controlling with respect to plaintiffs' ownership of the disputed property. *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995).

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly