

FILED: October 9, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

THOMAS J. MINIHAN,
Plaintiff-Respondent,

v.

THOMAS STIGLICH,
Defendant-Appellant.

THOMAS J. MINIHAN,
Plaintiff-Appellant,

v.

THOMAS STIGLICH,
Defendant-Respondent.

Clackamas County Circuit Court
CV08090475

A144998 (Control)
A145972

Robert D. Herndon, Judge.

Argued and submitted on November 02, 2012.

R. Daniel Lindahl argued the cause for Thomas Stiglich. With him on the briefs were Lindahl Law Firm, PC, and Andrew M. Cole, and Cole Tait, PC.

Michael B. Merchant argued the cause for Thomas J. Minihan. With him on the briefs were Margaret E. Schroeder and Black Helterline LLP.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

In A144998 and A145972, affirmed.

1 NAKAMOTO, J.

2 Defendant Stiglich and plaintiff Minihan are neighbors in a residential area
3 located next to the Willamette River. Plaintiff, along with several dozen other
4 homeowners not including defendant, owns an undivided interest in a narrow lot that
5 provides access to the river. The southern border of plaintiff's access lot runs along the
6 northern border of defendant's property. After defendant erected a fence on the access lot
7 and engaged in other activities that interfered with plaintiff's use of the lot, plaintiff sued
8 defendant. After a bench trial, the court awarded plaintiff \$10,000 in compensatory
9 damages and \$40,000 in punitive damages on plaintiff's claim of intentional trespass and
10 subsequently granted plaintiff summary judgment on plaintiff's quiet title claim. In
11 A144998, defendant challenges the damages awards as well as the order granting
12 summary judgment. In A145972, plaintiff assigns error to the trial court's denial of his
13 motion for attorney fees under ORS 20.105(1), which allows a prevailing civil litigant to
14 obtain fees from an opponent who had no objectively reasonable basis for asserting a
15 defense to the claim. We affirm.

16 I. FACTS

17 A. *The Boundary Dispute*

18 We begin with the background of the dispute leading to the compensatory
19 and punitive damages awards on plaintiff's trespass claim. We view the record in the
20 light most favorable to plaintiff, who prevailed below. *Lunda v. Matthews*, 46 Or App
21 701, 703, 613 P2d 63 (1980) ("[In] an appeal from a judgment in favor of plaintiffs,

1 private landowners, granting damages and injunctive relief in an action for trespass * * *
2 [t]he evidence [is] viewed in the light most favorable to plaintiffs[.]").

3 The access lot, Lot 16, is a 15-foot-wide strip of land running west to east
4 along the northern border of defendant's lot, Lot 10, from a neighborhood street to the
5 Willamette River. Lot 16 is jointly owned by plaintiff and all of the homeowners owning
6 property in the River Park subdivision of West Linn, and the lot provides them with
7 access to the river and an adjoining stretch of beach. Plaintiff has been an owner of Lot
8 16 since 1987. Plaintiff purchased his home, in part, because it was accompanied by the
9 deeded interest in Lot 16. Before the conflict that led to this litigation, plaintiff regularly
10 used Lot 16 to access the river and its beach without interference to engage in various
11 recreational activities, such as walking his dogs, enjoying the open air with his wife, and
12 viewing the local fireworks display each Independence Day with family members whom
13 he would invite to join him for the occasion.

14 Defendant is the sole owner of Lot 10 and resides in a home on that
15 property. Defendant purchased Lot 10 from the previous owner, Bates, in 2001. Several
16 years before selling Lot 10 to defendant, Bates and the owners of Lot 16, including
17 plaintiff, had a disagreement over the boundary line. After arranging for a survey to
18 determine the boundary line, Bates conceded that the line lay where plaintiff had asserted
19 it was located and then removed personal property--a metal shed and a large winch
20 system--that he had placed on Lot 16.

21 Defendant began encroaching on Lot 16 shortly after he purchased Lot 10,

1 building a grape trellis and dog run on the access lot. Plaintiff notified defendant that the
2 trellis and dog run were on Lot 16. Defendant disagreed, asserting that the boundary line
3 lay further north. For several years thereafter, defendant continued to dispute the location
4 of the boundary line and frequently accused plaintiff of trespassing when plaintiff was
5 utilizing Lot 16. Defendant began to verbally harass plaintiff when plaintiff would use
6 the access lot.

7 The conflict escalated on July 4, 2006, when plaintiff and his wife set out to
8 go to the river via Lot 16 and discovered that defendant had strung a rope between some
9 trees directly across the front of the access lot and posted a "No Trespassing" sign.
10 Defendant had placed the obstruction there that day in order to prevent plaintiff and his
11 invitees from using Lot 16 to access the river. When plaintiff and his wife walked past
12 the obstruction and continued on Lot 16 toward the river, defendant came out from his
13 home and stood in front of them to block them, accused them of trespassing, began
14 cursing at them, and insisted that he would not permit plaintiff or plaintiff's invitees to
15 use Lot 16 to access the river that evening. As a result, plaintiff cancelled his plans to
16 walk down to the beach that night with visiting family to observe fireworks.

17 Plaintiff's neighbor and co-owner of Lot 16, Hurd, subsequently
18 commissioned an engineer to locate and map the monuments identifying the boundary
19 line between the access lot and Lot 10. The engineer located the boundary monuments
20 while defendant was present. Those monuments demonstrated that the property line was
21 located where plaintiff had previously indicated. Defendant nevertheless refused to

1 accept the results and continued to contend that his property extended beyond the
2 boundary line established by multiple surveys.

3 Shortly thereafter, in November 2006, defendant requested that the county
4 perform a survey of the property. The county agreed and hired Compass Engineering to
5 establish the boundary line. Although defendant was aware that previous surveys of Lot
6 10 were available at the county surveyor's office, he never attempted to review them.

7 While waiting for the results from the survey that he had requested,
8 defendant continued to interfere with plaintiff's use and enjoyment of Lot 16. Two
9 significant events occurred during the summer of 2007. On June 27, plaintiff and his
10 wife were sitting at the beach on Lot 16 when defendant approached them, accused them
11 of trespassing, and then called the police. Defendant's sons and several other individuals,
12 who were drinking alcohol, also approached plaintiff and his wife, surrounding them,
13 until the police arrived. Although plaintiff was on his own property, he volunteered to
14 relocate further up the beach to placate defendant. After the police left, however,
15 defendant continued yelling at plaintiff, and plaintiff elected to return home rather than
16 endure further harassment from defendant.

17 Several days later, on July 3, defendant erected a chain-link fence on Lot
18 16. The fence was located wholly on Lot 16 and ran diagonally across Lot 16 from the
19 southwest corner to the northeast corner. Plaintiff could not use the access lot to reach
20 the river the following day, the July 4 holiday. Because of the fence, plaintiff's use and
21 enjoyment of the property was "[p]retty much eliminated."

1 Compass completed its survey of Lot 16 the following month, August
2 2007, and submitted it to the county for review and approval. The survey confirmed that
3 the boundary line was located where the earlier surveys had established it, *i.e.*, where
4 plaintiff had long maintained that it lay. The survey specifically concluded that
5 defendant's fence was wholly located on plaintiff's property. Defendant refused to accept
6 that the survey was accurate and did not remove the fence. Defendant continued to
7 maintain that plaintiff was, in fact, trespassing on his property. The county accepted the
8 survey and filed it in April 2008.

9 Plaintiff and defendant retained counsel, and, in July 2008, plaintiff sent
10 several letters to defendant citing the survey results and demanding that defendant
11 remove the trespassing fence. Defendant responded by asserting--without offering any
12 legal or factual basis for his position--that he owned the disputed portion of Lot 16.

13 B. *The Continuing Dispute and the Trial on Plaintiff's Claims for Trespass and*
14 *Ejectment*

15
16 Plaintiff commenced this lawsuit in September 2008. Plaintiff's complaint
17 stated claims for, *inter alia*, trespass and ejectment, alleging that, without legal basis or
18 justification, defendant had wrongfully claimed ownership of part of Lot 16, wrongfully
19 possessed Lot 16 by erecting the fence with knowledge that such conduct was
20 trespassory, and intentionally "interfere[d] with [P]laintiff's use of Lot 16 by harassing
21 and threatening Plaintiff, his co-owners, guests and invitees when those persons were
22 using Lot 16." Plaintiff further alleged that he had "been damaged by [his] inability to
23 access the Willamette River and enjoy the benefits of ownership of Lot 16." Plaintiff

1 requested "damages for the loss of use and quiet enjoyment of Lot 16 in an amount not to
2 exceed \$10,000[.]" The complaint, as amended, also requested an award of \$75,000 in
3 punitive damages on the theory that defendant's conduct was the type of conduct that
4 such damages are intended to deter. In addition to damages for trespass, plaintiff sought
5 declaratory and injunctive relief ordering defendant to remove all encroachments onto
6 Lot 16 and an award of attorney fees pursuant to ORS 20.105.

7 Shortly after plaintiff filed his complaint, defendant initiated construction to
8 expand his driveway up to the fence and onto Lot 16. On October 23, the trial court
9 issued a temporary restraining order to prevent defendant from further construction on
10 Lot 16. The court subsequently entered a preliminary injunction enjoining the
11 construction and barring defendant from trespassing on Lot 16 as identified in the
12 Compass survey and the 2006 monument survey that plaintiff's neighbor commissioned.

13 On October 14, 2008, less than a week after plaintiff had served defendant
14 with the complaint, defendant commissioned a new surveyor, Chase Jones, to determine
15 where the fence was located in relation to the boundary line. Chase Jones informed
16 defendant on or about November 5 that the fence was located on Lot 16.

17 Defendant's answer, as ultimately amended, admitted that the fence "was
18 substantially located on Lot 16." Defendant, however, denied many of plaintiff's
19 allegations and asserted several affirmative defenses, including failure to mitigate
20 damages, ownership, and good faith, and, in regards to plaintiff's quiet title claim, failure
21 to join necessary and indispensable parties. Defendant also asserted several

1 counterclaims.

2 Defendant finally removed the fence in March 2009--approximately 20
3 months after first installing it. Defendant also removed the grape trellis and the dog run.

4 Before trial, the presiding judge bifurcated resolution of the claims,
5 deferring action on the quiet title claim. The case proceeded to a bench trial on the
6 trespass and ejectment claims in January 2010. On the first day of trial, in response to a
7 series of pretrial motions, the trial court, "for the purposes of this proceeding," struck
8 defendant's affirmative defense that plaintiff had failed to join all necessary parties to the
9 quiet title action. The court similarly denied as moot a motion by defendant to dismiss
10 the quiet title claim on the ground that not all necessary parties had been added to the
11 case.

12 At trial, plaintiff offered evidence that, over the course of several years,
13 defendant had intentionally placed several physical barriers on Lot 16 to interfere with
14 plaintiff's use and enjoyment of the lot; that defendant had done so well after he knew
15 that he was trespassing; that defendant had harassed, threatened, and physically
16 intimidated plaintiff and his wife; and that defendant's conduct had in fact interfered with
17 plaintiff's use and enjoyment of Lot 16.

18 For his part, defendant asserted that he had a reasonable and good faith
19 belief that the boundary line lay farther north than plaintiff contended and that, therefore,
20 the fence and other encroachments were located on his lot, Lot 10. For example,
21 defendant disclaimed knowledge of the resolution of the dispute between Bates and the

1 owners of Lot 16 over the boundary line. According to defendant, he reasonably
2 assumed that the portion of Lot 16 that Bates utilized and maintained was, in fact, part of
3 his lot. He also claimed that Kliever, a county employee working at the pump station
4 located to the north of Lot 16, confirmed his understanding of the boundary line and that,
5 before he erected the fence on Lot 16, he had hired an unknown individual from a survey
6 firm to confirm that its placement would be on his lot. Defendant additionally argued
7 that all of the surveys prior to the one he commissioned from Chase Jones were flawed in
8 some way and that discrepancies between those surveys justified his opposition to
9 plaintiff's claim as to the boundary line.

10 Before the close of evidence, plaintiff withdrew his claim for ejectment.
11 Plaintiff requested, however, that the preliminary injunction previously issued be made
12 permanent. In his closing argument, defendant conceded that the facts justified awarding
13 damages to plaintiff but argued that the evidence was not sufficient to support the
14 requested amount of \$10,000 in compensatory damages.

15 The trial court orally announced its decision following the close of
16 evidence. As to the trespass claim, the court awarded plaintiff \$10,000 in compensatory
17 damages and \$40,000 in punitive damages. The court also made permanent the
18 preliminary injunction barring defendant from trespassing on Lot 16. The court
19 explained:

20 "[Defendant] embarked on a course of conduct here, which causes
21 me to award damages for the trespass in the amount of the prayer of
22 \$10,000. T[his] * * * was an interference with the plaintiff's right to use
23 their property that was intentional, and I conclude from the evidence that it

1 was motivated not just out of a legitimate garden-variety boundary dispute,
2 but went well beyond that * * *.

3 * * * * *

4 "[B]ecause of the fact that you had multiple opportunities to make
5 this right, that there were multiple interferences with the plaintiff's use of
6 their property, some award of punitive damages are in order in this case. * *
7 * [S]ometimes an award of punitive damages is appropriate, sort of for the
8 public utility of it of--of encouraging [p]laintiffs to bring claims to right
9 wrongs that would not otherwise be brought because their overall damages
10 are not--not great. And I think this is one of those cases that--to send a
11 message to yourself and to someone else who might be inclined to engage
12 in this kind of self-help, that it's not appropriate."

13 C. *Summary Judgment on the Quiet Title Claim*

14 The parties do not dispute the following additional procedural facts relating
15 to the grant of summary judgment on the quiet title claim. Plaintiff sought to quiet title in
16 Lot 16, alleging that, without legal basis or justification, defendant claimed ownership of
17 all or part of the access lot. In his initial answer, defendant asserted as an affirmative
18 defense ownership of Lot 10 as well as a counterclaim seeking to quiet title in Lot 10.
19 Plaintiff then obtained a preliminary injunction barring defendant from trespassing "on
20 the property commonly referred to as Lot 16 of Linn's Addition as identified by the 2006
21 and 2008 surveys of Lot 16."

22 In June 2009, the presiding judge granted a motion allowing defendant to
23 amend his answer to add the co-owners of Lot 16 as additional parties necessary for
24 defendant's quiet title counterclaim. Over the next several months, the court granted two
25 motions by defendant to set over the trial on the basis that defendant needed additional
26 time to join those parties.

1 Defendant then filed an amended answer, in which he maintained his
2 affirmative defense of ownership, and to which he added the affirmative defense alleging
3 that plaintiff's quiet title claim failed to state a claim due to failure to join necessary and
4 indispensable parties (the co-owners of Lot 16). Defendant's amended answer did not
5 include the quiet title counterclaim that appeared in his initial answer. Nevertheless, in
6 mid-December 2009, defendant made a third request for a setover to allow defendant
7 more time to join the co-owners of Lot 16. The court denied the motion.

8 Plaintiff subsequently filed a motion for summary judgment on the quiet
9 title claim, arguing that the trial on the trespass and ejectment claims had conclusively
10 established the location of the boundary line between the access strip and defendant's lot,
11 thereby precluding defendant from relitigating that factual issue in the context of a trial
12 on the quiet title claim. Defendant countered that several of the elements necessary for
13 issue preclusion to apply were not satisfied and that, therefore, the boundary line was a
14 genuine issue of material fact precluding summary judgment. Defendant argued
15 specifically that the failure to join the co-owners of Lot 16 in the initial proceeding
16 prevented plaintiff from successfully establishing the particular prerequisites for issue
17 preclusion pertaining to fairness. Defendant relied solely on arguments concerning the
18 applicability of issue preclusion; he did not advance any argument that plaintiff was not
19 otherwise entitled to summary judgment as a matter of law on the quiet title claim.

20 Some of the proceedings at the trial on the trespass and ejectment claims
21 were relevant to the summary judgment motion on the quiet title claim. As earlier noted,

1 the court dismissed defendant's affirmative defense for failure to join necessary parties
2 and likewise denied, as moot, a motion by defendant--filed that day--seeking to dismiss
3 plaintiff's quiet title claim on the same basis. Leading up to those rulings, the following
4 exchange took place between defendant's counsel and the court:

5 "[THE COURT:] [A]re you still seeking to rely on your fifth
6 affirmative defense, failure to join necessary parties, or is that--

7 "[DEFENDANT:] We had filed a separate motion to dismiss the
8 claim to quiet title, which I believe was--was still in the amended
9 complaint, even after the presiding judge indicated we were going to
10 bifurcate that aspect of the pleadings. And we--our intention is to--that we
11 leave that to another proceeding, where all of the indispensable parties are
12 present.

13 "* * * * *

14 "THE COURT: --Wouldn't you agree that for the purposes of what
15 we're doing here, we don't need anybody else--

16 "[DEFENDANT]: Right."

17 Immediately following that exchange, plaintiff expressly flagged the
18 possibility that the trespass and ejectment proceedings could determine the boundary line
19 and might therefore preclude relitigation of that issue with regard to the quiet title claim.
20 The court responded, "I agree it's likely to establish the boundary line as to these--these
21 parties, but it's not going to establish the boundary line as to somebody who's not a party
22 to these proceedings." Defendant and the court then discussed the possible ramifications
23 of the trespass and ejectment proceedings:

24 "[DEFENDANT:] Well, may I speak to that, Judge, briefly? Our
25 position was, until the presiding judge denied our motion to continue both
26 the trespass and the quiet title action so that they could be brought together
27 so that all the indispensable parties would be present, was because we

1 believed that having all the parties in one room is a predicate to quieting
2 title to the property, which appeared--

3 "THE COURT: We're not trying a quiet title action.

4 "[DEFENDANT:] Well, that was--that was the basis for--for
5 attempting to join those parties, because the plaintiff in the com--orig--
6 initial complaint and in the amended complaint had sued to quiet title. So
7 that was in the pleadings, and in the--

8 "THE COURT: So what's * * * the point here?

9 "[DEFENDANT:] The point is, is that I think that it is a--it is a
10 mistake, respectfully, to determine a boundary that is binding on some but
11 not all of the parties.

12 "* * * * *

13 "THE COURT: * * * [T]hat's not a decision that's going to be made,
14 whether it's binding against him as opposed to the world in this litigation,
15 that would be the next case * * * [.] And, you know, I'm going to make
16 findings that are consistent with the issues framed by the pleadings, and it
17 will be subsequent litigation which will decide whether there's been a
18 collateral estoppel made. * * * I can't for the world, announce in this case:
19 Mr. Stiglich, you can't ever, you know, claim, you know, forever against,
20 you know, A, B and C or X, Y and Z that this isn't the boundary line.

21 "* * * * *

22 "THE COURT: If you think that's what I'm doing, I'm not.

23 "[DEFENDANT:] I'm speaking of Counsel's comments that we're
24 going to have a boundary line between Mr. Minihan and Mr. Stiglich, but
25 with respect to, for example, Mrs. Minihan, that's going to be--that could be
26 a different boundary line. That's where I think the fact that we've got 60
27 owners of this lot 16 is going to create a--a real problem, if--if we start
28 having different boundaries for different individuals based upon the fact
29 that--

30 "THE COURT: No. You * * * misunderstood. I said it's going to
31 establish the boundary line as to these two litigants. That's what I said; you
32 weren't listening. I didn't say it was going to establish the boundary line
33 against the rest of the world.

1 "[DEFENDANT:] I see. Okay.

2 "* * * * *

3 "[DEFENDANT:] I understand your ruling."

4 Although upon conclusion of the trial on the trespass and ejectment claims,
5 the trial court deferred ruling on the quiet title claim "unless and until all owners of Lots
6 10 and 16 are party to this action[,]" the court ultimately adjudicated plaintiff's summary
7 judgment motion without joinder of the other owners of Lot 16. At the urging of the
8 parties, the court resolved the matter on the basis of issue preclusion.

9 The court made the following findings of fact:

10 "5. After hearing testimony at trial from surveyors for both
11 parties during trial, the Court found at the conclusion of trial that the
12 methodology used by Compass Engineering, Inc. was more credible and
13 more likely to result in a correct boundary line.

14 "6. Based on the property boundaries set forth in the Compass
15 Survey, the Court found in favor of plaintiff and against defendant on
16 plaintiff's claims for trespass and ejectment and made the preliminary
17 injunction previously entered in this matter permanent, utilizing the
18 property boundaries monumented and set in the Compass Survey.

19 "7. The Court could not have determined plaintiff's claims for
20 trespass and ejectment and made the preliminary injunction permanent
21 without first ascertaining the correct boundary line between plaintiff's and
22 defendant's properties, which the Court determined was the boundary line
23 set forth in the Compass Survey."

24 Based upon those findings of fact, the court then concluded that there were no factual
25 disputes for trial and that

26 "plaintiff is entitled to judgment in his favor as a matter of law on his claim
27 for quiet title on the ground that defendant is barred by the doctrine of
28 collateral estoppel from claiming any estate, title, claim, lien or any other

1 interest in Lot 16 beyond the property line monumented and set on the
2 Compass Survey."

3 *D. Denial of Plaintiff's Motion for Attorney Fees*

4 Plaintiff filed a motion for an award of his attorney fees under ORS
5 20.105(1), which the trial court denied. Under that statute, a prevailing party is awarded
6 its attorney fees if the opponent had no "objectively reasonable basis" for its position.
7 When a party appeals an award of attorney fees that is based solely on ORS 20.105(1),
8 "[w]e describe the pleadings, litigation, and evidence * * * without considering the trial
9 court's resolution of disputed historical facts." *Williams v. Salem Women's Clinic*, 245 Or
10 App 476, 478, 263 P3d 1072 (2011).

11 In his amended answer, defendant asserted that, at the time he purchased
12 Lot 10, the actual boundary line was not known because a monument to the line was
13 missing and because the prior owner of Lot 10 had maintained part of what turned out to
14 be the access lot in a manner that implied it was actually part of Lot 10 and never
15 informed defendant that it was in fact part of the access lot. As noted above, defendant
16 also alleged that, shortly after purchasing Lot 10, he attempted to locate the boundary line
17 and a county employee informed him--erroneously, as it ultimately turned out--of its
18 location. Defendant allegedly relied on that misidentification of the boundary line when
19 constructing the trespassory trellis, dog run, and fence on Lot 16.

20 At trial, defendant highlighted certain irregularities indicated by one of the
21 surveys upon which plaintiff primarily relied in proving his case. Defendant relied on the
22 fact that that survey located the boundary line running directly through a part of

1 in an intentional trespass action may recover compensatory damages for both loss of use
2 and emotional distress resulting from a defendant's interference with use and enjoyment
3 of the land. *Hudson v. Peavey Oil Company*, 279 Or 3, 10, 566 P2d 175 (1977)
4 ("Temporary injury * * * justifies damages measured by the loss of use or rental value
5 during the period of the injury[.]"); *McGregor v. Barton Sand & Gravel, Inc.*, 62 Or App
6 24, 32, 660 P2d 175 (1983) ("We conclude that the *Edwards [v. Talent Irrigation*
7 *District*, 280 Or 307, 570 P2d 1169 (1977),] rule, allowing emotional distress damages
8 for interference with the use and enjoyment of land, is * * * applicable in intentional
9 trespass actions * * *."). Plaintiff alleged that defendant "interfere[d] with [p]laintiff's
10 use of Lot 16 by harassing and threatening" him and that he was damaged by his
11 "inability to * * * enjoy the benefits of ownership" and sought an award of \$10,000.
12 Those allegations are sufficient to satisfy the relevant rule regarding claims for relief,
13 ORCP 18, which merely requires "[a] plain and concise statement of the ultimate facts
14 constituting a claim for relief" as well as "[a] demand of the relief which the party claims;
15 [including] if recovery of money or damages is demanded, the amount thereof." ORCP
16 18.

17 We also conclude, contrary to defendant's argument, that the evidence
18 supports the compensatory damages award. In doing so, we reject plaintiff's contention
19 that defendant failed to properly preserve his argument that the evidence was insufficient
20 to support the \$10,000 compensatory damages award. Defendant's trial-level argument
21 regarding damages included the assertion that plaintiff had not presented evidence of

1 harm that could justify anything but nominal damages. The trial court explained that
2 defendant's extraordinary and intentional behavior was the basis for its award.
3 "We will affirm a trial court's decision on compensatory damages if *any* evidence
4 supports it." *Eden Gate, Inc. v. D&L Excavating & Trucking, Inc.*, 178 Or App 610, 619,
5 37 P3d 233 (2002) (emphasis added). At trial, plaintiff offered evidence that defendant
6 intentionally placed several physical barriers on Lot 16 in order to interfere with
7 plaintiff's use of the lot and did so well after he knew that he was trespassing; that
8 defendant's conduct diminished the value of plaintiff's property; and that defendant
9 harassed, threatened, and physically intimidated plaintiff and his wife. Such evidence
10 supports the trial court's award of compensatory damages to plaintiff. *See Senn v.*
11 *Bunick*, 40 Or App 33, 39, 594 P2d 837, *rev den*, 287 Or 149 (1979); *Lunda*, 46 Or App
12 at 709. We thus affirm that award.

13 Our decision to affirm the trial court's award of compensatory damages is
14 fatal to defendant's second assignment of error, in which he contends that we should
15 reverse and remand the trial court's award of punitive damages only in the event that we
16 reverse and remand the award of compensatory damages. We therefore affirm the trial
17 court's award of \$40,000 in punitive damages to plaintiff.

18 B. *Summary Judgment on the Quiet Title Claim*

19 In defendant's third assignment of error, he challenges the trial court's
20 determinations on elements of issue preclusion as a basis to grant plaintiff summary
21 judgment on the quiet title claim. Summary judgment is appropriate if there is no

1 genuine issue as to any material fact and the moving party is entitled to judgment as a
2 matter of law. ORCP 47 C. Defendant renews his argument that summary judgment was
3 not appropriate because a genuine issue of material fact exists for trial. The manner in
4 which the parties litigated the quiet title claim in the trial court--with a focus solely on the
5 application of issue preclusion--dictates our conclusion that the trial court did not err in
6 the manner defendant specifies on appeal.

7 Under the doctrine of issue preclusion, a party is bound by the
8 determination of a particular issue in an earlier proceeding. *Nelson v. Emerald People's*
9 *Util. Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). "Issue preclusion arises in a
10 subsequent proceeding when an issue of ultimate fact has been determined by a valid and
11 final determination in a prior proceeding." *Id.* at 103. For issue preclusion to apply,
12 several conjunctive requirements must be satisfied: (1) the issue in the two proceedings
13 must be identical, (2) the issue must have been "actually litigated" and "essential to a
14 final decision on the merits" in the prior proceeding, (3) the party sought to be precluded
15 must have had a "full and fair opportunity to be heard on that issue," (4) the party sought
16 to be precluded must have been a party or in privity with a party to the prior proceeding,
17 and (5) the prior proceeding must be a type to which a court may give preclusive effect.
18 *Id.* at 104. Even where those elements are met, "[t]he court must also consider the
19 fairness under all the circumstances of precluding a party." *State Farm v. Century Home*,
20 275 Or 97, 110, 550 P2d 1185 (1976) ("If the circumstances are such that our confidence
21 in the integrity of the determination is severely undermined, or that the result would

1 likely be different in a second trial, it would work an injustice to deny the litigant another
2 chance."). *Id.* at 108.

3 Defendant contends, as he did in the trial court, that the court erred in
4 foreclosing relitigation of the boundary line because the first, second, and third issue
5 preclusion prerequisites are not satisfied. Defendant also renews his argument that, under
6 all the circumstances, issue preclusion is unfair in this case.

7 Defendant does not assign error based on either the fourth or the fifth
8 elements of issue preclusion articulated above. We note, however, that the trial on the
9 trespass and ejectment claims in this case is not, in fact, the type of "proceeding" to
10 which the trial court should have given preclusive effect. The doctrine of issue
11 preclusion "applies to subsequent lawsuits and not to *separate claims* within the same
12 lawsuit." *Westwood Corp. v. Bowen*, 108 Or App 310, 315, 815 P2d 1282 (1991), *rev*
13 *dismissed*, 312 Or 589 (1992) (emphasis in original). Thus, "when an issue common to
14 separate claims has been determined in a *prior separate* action, general principles of issue
15 preclusion may apply." *Westwood Construction Co. v. Hallmark Inns*, 182 Or App 624,
16 632, 50 P3d 238, *rev den*, 335 Or 42 (2002) (emphasis in original). However, "issue
17 preclusion does not bar relitigation of an issue common to separate claims *when those*
18 *claims are litigated as part of a single action or lawsuit.*" *Id.* at 631-32 (emphasis in
19 original). Here, therefore, because plaintiff's quiet title claim was part of the same
20 lawsuit as the trespass and ejectment claims, the trial court should not have applied issue
21 preclusion to prevent defendant from offering further evidence to support his argument

1 regarding the correct boundary line. But because defendant did not make that argument
2 at trial and does not present it on appeal, we will not reverse the trial court's grant of
3 summary judgment on that basis; instead, we treat the litigation of the quiet title claim as
4 a separate "proceeding" for purposes of this appeal.

5 We turn now to consider the arguments that defendant has raised. We
6 review for errors of law. *State Farm*, 275 Or at 97, 104-05 ("[T]he question on review is
7 whether the evidence is sufficient as a *matter of law* to establish the elements of collateral
8 estoppel." (Emphasis in original)).

9 We readily conclude that the first two elements are satisfied because the
10 identical issue--the location of the boundary line--was actually litigated in the trespass
11 and ejectment proceeding and was essential to a final decision on the merits in that
12 proceeding. The summary judgment order makes clear that the parties actively disputed
13 the boundary line in the trespass proceeding and that the court's resulting determination
14 of the line served as a basis for the court's resolution of that proceeding in plaintiff's
15 favor. As noted above, the court wrote that, "[a]fter hearing testimony at trial from
16 surveyors for both parties," it determined that one particular survey was most reliable
17 and, "[b]ased on the property boundaries set forth in" that survey, "found in favor of
18 plaintiff and against defendant on plaintiff's claims for trespass and ejectment." The
19 court also "made the preliminary injunction previously entered in this matter permanent,
20 utilizing the property boundaries monumented and set in" that survey. In other words, as
21 the court found, it "could not have determined plaintiff's claims for trespass and

1 ejectment and made the preliminary injunction permanent without first ascertaining the
2 correct boundary line between plaintiff's and defendant's properties, which the Court
3 determined was the boundary line set forth in the Compass Survey."

4 Defendant's argument on appeal does little to overcome the trial court's
5 express declaration that the identical issue was actually litigated and essential to the
6 judgment in the prior proceeding. Indeed, defendant effectively concedes that the parties
7 actually litigated the identical issue in the prior proceeding when he states, "It is true that
8 the trespass/ejectment trial had considerable evidence about boundaries, not only between
9 [defendant's] lot and Lot 16, but between other lots as well. Both parties called surveyors
10 who gave conflicting testimony about the location of the boundary between the lots."
11 Defendant also admits that he "present[ed] evidence that there was a genuine dispute
12 about the location of the property line."

13 Defendant nevertheless argues that the first two elements are not satisfied
14 because, "in the context of this case, identifying a boundary for purposes of the injunction
15 against trespasses was not the same as identifying a boundary for purposes of quieting
16 title." According to defendant, identification of the boundary line was merely a
17 "secondary issue" in the trespass proceeding, while it was the "primary" issue in the
18 subsequent quiet title proceeding. Defendant asserts that he adduced evidence regarding
19 the boundary line only to the extent necessary to defend against plaintiff's punitive
20 damages and attorney fees claims by showing that his view of its location was
21 reasonable. In other words, defendant contends, the exact location of the boundary line

1 was not essential to the trespass proceeding, and he did not litigate that issue as
2 aggressively as he would have in the context of a trial to quiet title.

3 Defendant's argument fails for several reasons. First, even if defendant's
4 characterization of the boundary line as a "secondary" issue in the trespass proceeding
5 were accurate, that fact would not bear on the question of whether that issue is identical
6 in each of those proceedings. Second, as we noted in our recitation of the facts, the
7 parties and the court expressly discussed the likelihood that the trespass proceeding
8 would determine the boundary line and might therefore preclude relitigation of that issue
9 in a subsequent trial on the quiet title claim.

10 Third, the record is replete with comments and assertions made by
11 defendant that belie his argument on appeal that he did not appreciate the centrality of the
12 boundary line issue to plaintiff's substantive claims in the initial proceeding. For
13 example, at the preliminary injunction hearing, defendant told the court, "I think the
14 dispute is over, you know, where the property line is." Then defendant filed a motion *in*
15 *limine* to exclude any recitation of facts and evidence received in the preliminary
16 injunction hearing from the trial, which defendant feared would suggest that the
17 preliminary injunction ruling "created a factual finding as to the true boundary line that is
18 binding" and thereby "resolved an issue that actually was an issue of fact for them to
19 decide at trial." Although the court denied that motion, it also ruled that "the preliminary
20 injunction * * * is not the end of the discussion on whether there was a trespass--or where
21 the boundary line was." At trial, in his opening statement to the trial court, defendant

1 framed the case by stating that "the case changed over time, it went from: Where is the
2 boundary and where's the fence? to: Where is the property line? And whether or not
3 [defendant] will accept the Compass survey results for where that line should be."
4 Defendant further asserted at trial that, "very early in the case, the encroaching fence was
5 an issue * * * [b]ut the case continued and went to trial" after removal of the fence
6 "because we ha[d] a reasonable, objectively verifiable difference of opinion of where this
7 property line actually is." Defendant's own comments confirm the trial court's
8 determinations that both parties actually litigated the issue of the boundary line in the
9 trespass proceeding and the issue was necessary to resolve that proceeding.¹

10 Defendant argues, finally, that the trial court erred by applying issue
11 preclusion because he did not have a full and fair opportunity to be heard on his quiet title
12 claim and it was thus not fair under all the circumstances to quiet title against him in the
13 manner that the court did. Defendant's argument, however, conflates the specific issue
14 precluded (the boundary line) with the overall claim (quiet title) that is barred as a result

¹ To the extent that defendant contends that the determination of the boundary line was not "essential" because it might have been possible to render a decision on the trespass claim without the parties litigating where the boundary line was located, we disagree. An issue need not necessarily be literally "essential" to a prior determination to have preclusive effect under the doctrine of issue preclusion. *Westwood Construction Co.*, 182 Or App at 635. "To be sure, cases often refer to whether a previously resolved issue was essential or necessary to a prior adjudication as a means of ensuring, especially in the context of a general verdict or judgment, that the issue was actually litigated and determined in the prior proceeding." *Id.* at 635. But where "the face of a judgment or order in a prior proceeding demonstrates that a matter was actually determined, the determination is preclusive." *Id.* at 636. Here, the limited judgment on the trespass claim stated what the property boundaries were.

1 of that preclusion.

2 According to defendant, the manner in which the trial court conducted the
3 case "was manifestly unfair" for two reasons. First, he contends that "the court's repeated
4 statements that the trial did not involve the quiet title action affected the manner in
5 which" defendant presented his case. Second, he argues that the court "unfairly
6 prevented [defendant] from being heard on his defense that it was improper to quiet title
7 without joining all of the Lot 16 owners." Defendant's arguments miss the mark.

8 The relevant inquiry is not whether he had a full and fair opportunity to
9 present his argument opposing plaintiff's quiet title claim, but whether he had such an
10 opportunity to be heard on the issue of the boundary line. Likewise, we consider the
11 overarching fairness of the trial court's decision to preclude relitigation of the boundary
12 line, not its subsequent decision, based *in part* on the preclusion decision, to grant
13 plaintiff's summary judgment motion on the quiet title claim.

14 With that orientation in mind, we conclude that defendant had ample
15 opportunity to be heard on the issue of the boundary line. That is evident from our
16 discussion highlighting the significance of that issue to the trial court's disposition of the
17 trespass proceeding, as well as defendant's numerous acknowledgments that he had and
18 took advantage of the opportunity to present evidence on that issue. The third element of
19 issue preclusion that defendant challenges on appeal was satisfied.

20 We also agree with plaintiff that it was fair under all the circumstances to
21 preclude defendant from relitigating the factual issue of the boundary line. There are no

1 circumstances in this case that "severely undermine" our confidence in the integrity of the
2 court's preclusion determination, nor do we believe "that the result would likely be
3 different in a second trial[.]" *State Farm*, 275 Or at 108-09 (concluding that such
4 circumstances exist where, for example, "it is apparent that the verdict was the result of a
5 jury compromise," the prior determination was "manifestly erroneous," "newly
6 discovered or crucial evidence that was not available to the litigant at the first trial * * *
7 would have a significant effect on the outcome[.]" or where "outstanding determinations
8 are actually inconsistent on the matter sought to be precluded").

9 In sum, we reject defendant's contention that the trial court erred when it
10 concluded that there were no genuine issues as to any facts material to plaintiff's quiet
11 title claim, given that defendant invited the trial court to apply the issue preclusion
12 doctrine when he litigated the summary judgment motion. And, although it is normally
13 inappropriate as a matter of law to quiet title where, as here, it appears that not all persons
14 who have or may have an interest in the property are parties to a proceeding, *see State ex*
15 *rel Dept. of Trans. v. Tolke*, 36 Or App 751, 753 n 2, 586 P2d 791 (1978), such
16 nonjoinder will not serve as a basis for reversing a trial court's quiet title judgment when
17 the losing party fails to properly assign error to the nonjoinder. *Id.* at 766. Although
18 defendant does argue that the trial court failed to join the co-owners of Lot 16, he deploys
19 that argument only as part of his challenge to the trial court's determinations on the
20 elements of issue preclusion, the same framework he presented first to the trial court.
21 Defendant has not assigned error to the trial court's dismissal of his affirmative defense

1 based on nonjoinder of necessary parties, leaving us with no basis upon which we could
2 reverse the trial court's judgment quieting title. Therefore, we affirm the court's summary
3 judgment ruling.

4 C. *Denial of Plaintiff's Motion for Attorney Fees*

5 We now turn to plaintiff's appeal concerning the denial of his motion for
6 attorney fees under ORS 20.105(1). As relevant to this case, ORS 20.105(1) provides:

7 "In any civil action, suit or other proceeding in a circuit court * * *, the
8 court shall award reasonable attorney fees to a party against whom a * * *
9 defense * * * is asserted, if that party is a prevailing party in the proceeding
10 and to be paid by the party asserting the * * * defense * * *, upon a finding
11 by the court * * * that there was no objectively reasonable basis for
12 asserting the * * * defense[.]"

13 A defense lacks an objectively reasonable basis only if it is "entirely devoid of legal or
14 factual support," *Olson v. Howard*, 237 Or App 256, 269, 239 P3d 510 (2010), either at
15 the time it is made or, "in light of additional evidence or changes in the law," as litigation
16 proceeds, *Dimeo v. Gesik*, 197 Or App 560, 562, 106 P3d 697 (2005). Whether a claim
17 lacks an objectively reasonable basis is a question of law, and we review the trial court's
18 ruling on that question for legal error. *Williams*, 245 Or App at 482.

19 Here, the trial court concluded that defendant had an objectively reasonable
20 basis to defend against the trespass and ejectment claims because he possessed "a survey
21 prepared by a qualified surveyor which disagreed with the location of the boundary line
22 as determined by the Compass survey." We agree. The survey that defendant
23 commissioned supported the notion that prior surveys and representations of the
24 boundary line's location might not be completely accurate. Given that those other

1 surveys and representations are precisely what defendant contested, it follows that the
2 survey that he commissioned represented an objectively reasonable basis upon which to
3 defend against plaintiff's trespass and ejectment claims.

4 Plaintiff argues that the better evidence has always been that the boundary
5 line lay where plaintiff has asserted from the outset of the dispute and that, therefore,
6 defendant "knew or should have known" where the boundary line was located well before
7 acquiring the survey referenced in the trial court's money award. There are two problems
8 with plaintiff's argument. First, the relevant inquiry is not whether defendant's evidence
9 was less persuasive (either in terms of its weight or volume) than other, contrary or
10 competing evidence. The question is whether there was *any* evidence to support the trial
11 court's conclusion that defendant had an objectively reasonable basis to defend the action.
12 The Chase Jones survey and the survey showing the boundary going through defendant's
13 improvements on his property constituted such evidence. Second, even assuming that
14 defendant should have known where the boundary line was and that he acted in bad faith,
15 as plaintiff's argument implies and the trial court expressly noted, it is well established
16 that a party's subjective state of mind is not relevant to our analysis of the propriety of a
17 fee award under ORS 20.105; even "bad faith and improper motives are not relevant
18 considerations in determining whether an award of attorney fees is required under ORS
19 20.105(1)." *Hunt v. City of Eugene*, 249 Or App 410, 432, 278 P3d 70, *rev den*, 353 Or
20 103 (2012) (collecting cases).

21 Plaintiff also contends that, even if the Chase Jones survey--which

1 defendant commissioned early in the litigation--provided defendant with an objectively
2 reasonable basis for continuing the litigation, defendant lacked such a basis prior to
3 receiving the results of that survey, including when he filed his answer. Although it is
4 true that the Chase Jones survey is the only specific documentary evidence that the trial
5 court cites in its ruling denying plaintiff attorney fees, the trial court did find that "the
6 claims [defendant] made at trial *and in his pleadings* do not warrant an award of
7 attorney's fees." (Emphasis added.) Given that, at the hearing on plaintiff's motion for
8 fees, defendant asserted that the record revealed nine facts that individually and
9 collectively rendered defendant's litigation objectively reasonable, including
10 documentary evidence that could tend to support defendant's understanding of the
11 boundary line, as well as, conversely, evidence suggesting that the bases for plaintiff's
12 assertion regarding the boundary line were potentially inaccurate, several of which
13 predate plaintiff's complaint, we do not find plaintiff's argument persuasive.

14 We decline to reach plaintiff's other argument on his appeal because it is
15 unpreserved. Plaintiff argues for the first time on appeal that the legislature's reference in
16 ORS 20.105(1) to "defense" in the singular indicates that attorney fees can be awarded on
17 a defense-by-defense basis depending on whether each one was objectively reasonable.
18 He urges us to consider his new argument because it is based on construction of the
19 relevant statute's text, relying on *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("In
20 construing a statute, this court is responsible for identifying the correct interpretation,
21 whether or not asserted by the parties."). However, our duty under *Stull* is limited to

1 circumstances in which, unlike here, "an issue of statutory construction [has been]
2 presented to a trial court and the court's interpretation of the law is at issue on appeal[.]"
3 *State v. Hardesty*, 238 Or App 146, 151, 241 P3d 741 (2010), *rev den*, 349 Or 654
4 (2011). Thus, we affirm the trial court's denial of plaintiff's motion for attorney fees.

5 In A144998 and A145972, affirmed.