STATE OF MICHIGAN

COURT OF APPEALS

THOMAS NEERING and BETTY NEERING,

Plaintiffs-Appellees,

v

TIMOTHY J. AWAD and DIANE M. AWAD,

Defendants-Third-Party-Appellants.

and

DAN'S EXCAVATING, INC.,

Third-Party Defendant.

UNPUBLISHED
August 6, 1996

No. 180753
LC No. 92-003667-CH

Before: Sawyer, P.J., and Bandstra and M.J. Talbot,* JJ

PER CURIAM.

Defendants appeal by right from a judgment and judgment lien issued in favor of plaintiffs following a bench trial in this nuisance and trespass case. We affirm.

Plaintiffs and defendants were neighbors. Plaintiffs had lived on their property before defendants built their house. The trial court found that defendants elevated their land in an unreasonable manner and caused large amounts of surface water to flood plaintiffs' land, resulting in substantial harm.

Defendants first contend that there was insufficient evidence to support a nuisance claim, that plaintiffs failed to adequately state a nuisance claim and that the trial court's findings of fact with regard to nuisance were not sufficiently specific. We disagree. Considering the evidence and all legitimate inferences therefrom in the light most favorable to plaintiffs, see *Bell v Merritt*, 118 Mich App 414, 417-418; 325 NW2d 443 (1982), there was sufficient evidence to support a finding of private

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* Circuit judge, sitting on the Court of Appeals by assignment.

nuisance: (1) it was undisputed that plaintiffs owned the land that was flooded with water from defendants' property; and plaintiffs presented evidence to show (2) significant harm caused by the flooding; (3) that defendants' elevation of their land was the legal cause of the flooding; and (4) that defendants intentionally elevated their land to flood plaintiffs' property so that their own property would not be flooded. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995). Moreover, plaintiffs stated a claim as their complaint provided reasonable notice of the nuisance claim, *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992), plainly stating that defendants created a nuisance by elevating their property in a manner that caused flooding to plaintiffs' property. Also, the trial court's findings of fact were sufficiently specific because the court was aware of the factual issues and correctly applied the law. *In re Forfeiture of $19,250*, 209 Mich App 20, 28-29; 530 NW2d 759 (1995).

Defendants next argue that there was insufficient evidence to support a trespass claim. We disagree. A trespass is an unauthorized invasion on another's private property. *Clover Car Co, supra*, 213 Mich App 195. There was testimony indicating that large amounts of water frequently ran off from defendants' land to plaintiffs' land. A builder and a real estate appraiser also testified that the flooding of plaintiffs' property was due to defendants' elevation of their land. Moreover, Ms. Neering testified that defendant Timothy Awad stated that he did not care about plaintiffs and that he was "building a hundred thousand dollar house" and did not "want to get flooded." This indicated that defendants' intentionally caused the flooding. Causing the intentional flooding of another's land with large and unnatural amounts of water constitutes a trespass. *Baker v City of Ann Arbor*, 381 F Supp 547, 550 (ED Mich, 1974). Accordingly, the evidence was sufficient.

Defendants assert that the trial court failed to make a finding on whether there was a physical invasion of surface water from defendants' property to plaintiffs' property. However, the court specifically found that defendants' alteration of their land caused virtually all of the water that fell on their land to run to plaintiffs' land.

Defendants next argue that there was insufficient evidence to support the finding that they proximately caused plaintiffs' damages. Defendants have failed to cite legal authority and have therefore abandoned this argument. *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405; 534 NW2d 143 (1995). Regardless, there was sufficient evidence to support a finding of proximate causation. Plaintiffs presented evidence that established a logical sequence of cause and effect from defendants' elevation of their land to the flooding of plaintiffs' land. *Skinner v Square D Co*, 445 Mich 153, 159-160; 516 NW2d 475 (1994).

Defendants next argue that the trial court deprived them of due process by basing its decision on legal and scientific theories not advanced by the parties and not supported by expert testimony. Again, defendants have failed to cite legal authority and have abandoned this issue. *Davenport, supra*, 210 Mich App 405. However, factfinders may and should use their common sense and everyday experience in evaluating evidence. *People v Simon*, 189 Mich App 565, 567-568; 473 NW2d 785

(1991). The trial court properly considered general knowledge about gravity and the flowing of water in reaching its decision.

Defendants next assert that the trial court erred by including an amount for emotional damages in its award of damages. We disagree. Private nuisance is a tort. *Adkins v Thomas Solvent Co,* 440 Mich 293, 303 n 7; 487 NW2d 715 (1992). Actual damages in tort cases include compensation for mental distress and anguish. *Phillips v Butterball Farms Co, Inc,* 448 Mich 239, 251 n 32; 531 NW2d 144 (1995), citing *Veselenak v Smith,* 414 Mich 567, 574; 327 NW2d 261 (1982). Mental anguish damages are not limited to recovery for physical pain. *Ledbetter v Brown City Savings Bank,* 141 Mich App 692, 703; 368 NW2d 257 (1985).

Defendants also indicate that emotional damages should not have been awarded because the complaint did not indicate that emotional damages were being sought. However, under MCL 600.2315; MSA 27A.2315, any deficiency in plaintiffs' complaint with regard to their claim for emotional damages is not a ground for disturbing the judgment because plaintiffs' counsel, without objection by defendants, indicated in his opening statement that plaintiffs were seeking emotional damages. Accordingly, defendants were not prejudiced by any deficiency in the complaint because they were on notice of this claim. Cf. *Emmons v Emmons,* 136 Mich App 157, 164; 355 NW2d 898 (1984).

We reject defendants' assertion that plaintiffs were not statutorily entitled to treble damages for the damages to trees on plaintiffs' property. With certain exceptions not applicable here, the plain language of MCL 600.2919(1); MSA 27A.2919(1) provides for treble damages where a person "despoils or injures any trees on another's lands . . . without the permission of the owner of the lands." In reviewing legislation, "our duty is to give effect to the intent of the Legislature as expressed by the plain meaning of the statute." *Grand Traverse Co v State of Michigan,* 450 Mich 457, 464; 538 NW2d 1 (1995).

Lastly, defendants argue that the trial court abused its discretion by denying their motion for a new trial based on newly discovered evidence regarding the adequacy of the existing swale and catch basin system to contain water on defendants' property. This issue is abandoned, however, due to the failure to cite legal authority. *Davenport, supra,* 210 Mich App 405. Regardless, the grant of a new trial based on newly discovered evidence requires that the evidence could not with reasonable diligence have been discovered and produced at trial. MCR 2.611(A)(1)(f); *Heshelman v Lombardi,* 183 Mich App 72, 81-82; 454 NW2d 603 (1990). The efficacy of the swale and catch basin was the subject of trial testimony. Defendants have not adequately explained why, with reasonable diligence, they could not have presented at trial evidence showing that the swale and catch basin were sufficient to contain water on defendants' property.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael J. Talbot