STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. HEGLER and PHYLLIS J. HEGLER,

Plaintiffs-Appellants,

v

ROBERT G. BERKHEIMER and MICHA BERKHEIMER,

Defendants/Third-Party-Plaintiffs-Appellees.

UNPUBLISHED
April 20, 1999

No. 207031
Roscommon Circuit Court
LC No. 95-006894 CH

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal by right from a judgment awarding them $7,011.36 of the $61,975 they claimed as damages. Plaintiffs' claim resulted from a purchase of a waterfront cottage from defendants, who had stipulated in writing that all buildings and improvements were located within the property's boundaries. The cottage itself, a barbecue pit, and a light pole encroached on neighboring property. We affirm in part and reverse in part.

Plaintiffs first argue the trial court erred in calculating plaintiffs' damages according to a square foot value of $15.87, as opposed to a waterfront foot value of $3,000. We agree. This Court reviews a trial court's findings of fact regarding damages for clear error. *Hofmann v Auto Club Ins*, 211 Mich App 55, 98-99; 535 NW2d 529 (1995). A finding is clearly erroneous when, despite evidence to support the finding, the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.*, 99.

In this case, the evidence at trial showed that property on Higgins Lake is valued at $3,000 per linear waterfront foot. This figure was not disputed. There was no evidence that the property was valued by multiplying the area of property by a price per square foot. Accordingly, the trial court clearly erred in converting the waterfront foot figure into a price per square foot of property to calculate plaintiffs' damages. The trial court should have calculated plaintiffs' damages by multiplying the waterfront foot price, $3,000, by the amount of waterfront footage contained within the triangular parcel, approximately four feet.[1] On remand, the trial court should determine the exact amount of

lakefront footage contained within the triangular parcel and enter judgment awarding plaintiffs damages calculated by applying this formula.

Plaintiffs next claim that the trial court clearly erred in basing its award on a triangular parcel rather than on the ten by 189-foot strip plaintiffs actually purchased. We disagree. Plaintiffs brought suit on the theory of innocent misrepresentation. To prevail under this theory, plaintiffs must show that they detrimentally relied "upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." *M & D, Inc v McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), citing *US Fidelity & Guaranty v Black*, 412 Mich 99, 118; 313 NW2d 77 (1981). Despite plaintiffs' argument that, on the basis of the sellers' affidavit signed in conjunction with the sale, defendants misrepresented that the boundary included all the improvements and buildings, the trial court found that plaintiffs could only have reasonably relied on defendant Robert Berkheimer's verbal representation that he had been told the relevant boundary ran through the middle of the barbecue pit. The trial court was in the best position to determine the credibility of the witnesses before it and this should be considered in determining whether factual findings are clearly erroneous. *Hofmann, supra* at 99. Therefore, it was not clearly erroneous for the trial court to calculate damages based on a triangular parcel bounded on one side by a line running through the middle of the barbecue pit. When plaintiffs originally purchased the cottage from defendants, they paid for property with an east boundary marked by the center of the barbecue pit; therefore, it is this payment that inured to the benefit of defendants. Plaintiffs did not pay defendants for the property reasonably relying on the assumption that the property included the ten-foot strip plaintiffs eventually purchased to clear up the boundary problems. Therefore, in restoring to plaintiffs the loss they incurred in relying on defendants' misrepresentation, the only portion of the $30,000 plaintiffs expended that inured to the benefit of defendants was that which reflected the cost of the strip up to the center of the barbecue pit. The trial court did not clearly err in basing its award on the triangular parcel.

Finally, plaintiffs argue the trial court erred by failing to award plaintiffs their attorney fees for this litigation and the entire amount of the legal and surveying costs incurred in purchasing the ten-foot strip. With regard to the $30,000 in transactional and attorney fees that plaintiffs seek, "[u]nder the traditional 'American rule,' each side must bear its own litigation expenses, unless the law or court rules specify an exception." *Salesin v State Farm*, 229 Mich App 346, 373; 581 NW2d 781 (1998). Plaintiffs rely on *Fagerberg v LeBlanc*, 164 Mich App 349; 416 NW2d 438 (1987), in arguing that this case comes within an exception to the general rule regarding attorney fees. However, the attorney fees awarded in *Fagerberg* were not the fees the plaintiffs expended in bringing the lawsuit, but rather were the fees the plaintiffs expended to correct the title deficiency. *Id.* Therefore, the general rule governs here and plaintiffs were not entitled to the $30,000 in attorney fees that they spent in bringing this lawsuit.

With regard to the attorney fees and the surveyor fees incurred in acquiring the ten-foot parcel, a tortfeasor is liable for all the injuries that result from his wrongful act, provided that the damages are the legal and natural consequence of his wrongdoing and might reasonably have been anticipated. *Fagerberg, supra* at 356-357. The *Fagerberg* Court held that surveyor and attorney fees expended in correcting a title deficiency are the legal and natural consequence of the fraudulent misrepresentation of a boundary line and are to be reasonably expected. *Id.* Therefore, the surveyor and attorney fees

plaintiffs expended in correcting the title deficiency that resulted from defendants' innocent misrepresentation were properly considered a reasonably expected legal and natural consequence. We conclude that plaintiffs are entitled to the full amount of those fees. Presumably, the trial court had in mind that defendants were responsible only for the purchase of the neighboring property up to the center of the barbecue and should therefore only pay for prorated fees. Yet, the land up to the center of the barbecue pit did not represent half of the ten-foot strip, and the cost of the survey and the attorney fees in handling the sale presumably would have been the same regardless of whether plaintiffs purchased only up to the center of the barbecue pit or the entire strip. Therefore, the trial court clearly erred in awarding less than the full amount of the surveyor and attorney fees that plaintiffs incurred in purchasing the neighboring property.[2]

Affirmed in part, reversed in part, and remanded for further proceedings and a modified judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald

[1] The trial court's opinion and order indicates that the amount of lakefront footage is approximately four feet, while plaintiffs' brief states that the amount is 4.4 feet.

[2] While the trial court intended only to award plaintiffs half of the attorney fees, plaintiffs were actually awarded half of the fees plus $25 because the trial court incorrectly assessed the entire fees at $375, instead of the $325 plaintiffs claimed. Therefore, in awarding plaintiffs their full attorney fees, plaintiffs are entitled to only an additional $137.50.