STATE OF MICHIGAN

COURT OF APPEALS

KIPP A. KATZ and JANET KATZ,

Plaintiffs-Appellees,

v

TROY LYNN FRANK, SHERRIE LYNN FRANK, and INA MAE FRANK as Trustee for the Ina Mae Frank Living Trust,

Defendants-Appellants.

UNPUBLISHED
June 14, 2002

No. 228979
Calhoun Circuit Court
LC No. 99-001495-CH

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment awarding plaintiffs damages, including treble damages, as a result of defendants' trespass. We affirm.

In this property dispute, the trial court found that plaintiffs had met their burden to establish title by acquiescence to eleven feet of land south of a fence on defendants' property, which was adjacent to plaintiffs' property. On appeal, defendants do not contest the trial court's determination concerning title to the disputed land, they appeal only the award of damages.

We review for clear error a trial court's findings of fact in a bench trial. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "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*, *supra*. In contrast, a trial court's conclusions of law are reviewed de novo. *Id.*

Defendants first contend that single, rather than treble, damages should have been awarded because defendants had probable cause to believe that the disputed property was their own.

In relevant part, MCL 600.2919 states:

(1) 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 … is liable to the owner of the land … 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.

Defendants argue that although the trial court first enunciated the probable cause standard in MCL 600.2919, it "changed the statutory standard to a higher standard" when it stated that "[d]efendant had nothing of any legal significance to allow him to conclude dispositively that this strip of land south of the fence belonged to him." We disagree. The trial court clearly stated the probable cause standard, indicating that an objective test is appropriate. The trial court looked to whether a reasonable person, given the circumstances at the relevant time, would believe that the disputed property was his own, and it clearly applied the correct standard. The trial court's comment on which defendants focus, when read in context, simply indicates that there was no evidence to negate its finding that defendants did not have probable cause to believe the property was their own. We find no error.

Defendants also argue that the trial court's determination that there was no probable cause to believe that the land was theirs was erroneous. According to defendants, their deed and the licensed surveyor sketch of their property gave them probable cause to believe the disputed property was their own. While it is undisputed that the deed shows defendants' property extended south of the fence, defendant Troy Frank testified that the sketch was the basis for his belief that the disputed property was his. Although the sketch showed defendants' property extended south of the fence, the sketch was only an approximation, and testimony indicated that Troy Frank was aware of that fact. Additionally, Troy Frank testified to a layman's understanding of the doctrine of adverse possession and he offered to buy from plaintiffs a one-acre piece of land south of the fence by the gate. The implication is that the offer was made because he believed that he was not, or at least may not have been, the owner of the disputed property. On this record, we cannot say that the trial court's finding that defendants did not have probable cause to believe that the property was their own was clearly erroneous.

Finally, defendants argue that the trial court erred in determining the amount of damages because the amounts were based on conjecture and speculation. More specifically, defendants challenge the award of damages to replace trees and the fence, excavation, loss of use, and the temporary driveway. An award of damages in a bench trial is reviewed for clear error. *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000). An appellate court may not set aside the award merely on the basis of a difference of opinion. *Id*.

Concerning damages, this Court has stated:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. It is sufficient if a reasonable basis for computation exists, although the result be only approximate. "'[W]here injury to some degree is found, we do not preclude recovery for lack of precise proof [of damages]. We do the best we can with what we have.'" [*Berrios v Miles, Inc*, 226 Mich App 470, 478-479; 574 NW2d 677 (1997) (citations omitted).]

See also *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995).

With respect to the replacement of trees that defendants destroyed, plaintiffs submitted an estimate of $4,500. Plaintiffs also submitted a video of the area destroyed. Troy Frank admitted to destroying one large tree and saplings that were two to three feet tall. Because it did not believe that the evidence supported the number or cost of trees that the estimate represented, the trial court awarded only $2,000, trebled. We conclude that the trial court had a reasonable basis to make its determination, and therefore the award was not clearly erroneous.

With respect to replacement of 445 feet of fence and the gate, plaintiffs submitted an estimate for $1,889.50. Testimony presented established that the length of fence destroyed was at least 50 feet, but up to approximately 390 feet. The trial court awarded plaintiffs $1,000 to replace the fence and gate, apparently concluding that the length of fence destroyed was somewhere in the middle. Defendants challenge this award, arguing that the replacement value should not be for a new fence because the fence was old and dilapidated.

If the injury is reparable, the proper 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. *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). However, this rule is not inflexible because the ultimate goal is to compensate the injured party for the harm or damage done. *Id*. Because it appears that the trial court took the condition of the fence into consideration by not trebling the damages, we cannot say that the award was clearly erroneous.

With respect to "excavation" covering closing the new driveway and grading, opening the old driveway and laying gravel, hauling away junk, and grading the area by the pond, plaintiffs submitted an estimate of $2,040. The trial court awarded only $1,500, trebled, because there was no evidence that the original driveway was graveled. Defendants argue that the trial court had no basis for determining that the graveling represented $540 of the estimate. However, damages are sufficient as long as there is a reasonable basis for their computation and mathematical precision is not required. *Berrios, supra*. We believe that, although the estimate did not assign costs to each task, it was reasonable for the trial court to assume that the graveling constituted approximately one-fourth of the total. We conclude that the award was not clearly erroneous.

With respect to the award of damages of $1,500 for loss of use, defendants argue that this award was in error because Kipp Katz continued to use his property for duck hunting and the trial court had no basis for calculating the amount of damages. Although the record reveals continued use, it also reveals that plaintiffs were not able to use the original driveway or gate and at times were not able to gain access to the property through the temporary driveway because it

became too slick to use when there had been a lot of rain. Testimony indicated that "[m]ost days duck hunting is great when it rains, not good when the sun shines." The record reveals that during rainy periods for a two-year period defendants' trespass impinged on plaintiffs' use of the property for its intended purpose, the sport and enjoyment of duck hunting,. The trial court awarded $1,500 for the loss of use and enjoyment of their property. Under the circumstances here, we conclude that this finding was not clearly erroneous. See *Berrios*, *supra*; *Thiele v Detroit Edison Co*, 184 Mich App 542, 545; 458 NW2d 655 (1990).

The trial court also awarded plaintiffs $750, trebled, for the cost of installing the temporary driveway. Kipp Katz testified that the amount listed in the complaint, which was $750, represented his out-of-pocket cost. We hold that this was a reasonable basis for determining damages, and, therefore, the award was not clearly erroneous.

Affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell