STATE OF MICHIGAN

COURT OF APPEALS

KYRIACOS M. PHILIPPOU and PANAYIOTA K. PHILIPPOU,

Plaintiffs-Appellees,

v

CMC INVESTMENTS, DANIEL L. WHITCOMB, and DEMO PANOS,

Defendants/Cross-Defendants/Third-Party Plaintiffs-Appellants,

and

JOHN KACIC, STACIE KACIC, and HERITAGE LOG HOMES, INC,

Defendants-Cross Plaintiffs,

and

CHARTER TOWNSHIP OF PITTSFIELD,

Defendant,

and

WASHTENAW COUNTY ROAD COMMISSION,

Third Party Defendant.

UNPUBLISHED
November 21, 2006

Nos. 261781; 262612
Washtenaw Circuit Court
LC No. 01-000299-NZ

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right an order granting summary disposition to plaintiffs on a trespass claim, an order granting plaintiffs damages on that claim,

and an order granting plaintiffs' case evaluation sanctions. We affirm in part, reverse in part, and remand.

Plaintiffs own real property in Washtenaw County. Defendants Daniel Whitcomb and Demo Panos are general partners of a Michigan partnership, defendant CMC Investments (CMC), that owns real property (CMC property) adjacent to and west of plaintiffs' property.[1] Both parcels are bordered at the North by Michigan Avenue. This dispute arises out of surface water runoff from defendants' and onto plaintiffs' property. The trial court found that defendants "created or gave permission for others to create an artificial ditch" on their land, resulting in an alteration of "the historic and natural flow of off-site water from" a culvert running under Michigan Avenue. The court further found that the redirected water constituted a continuing trespass and issued an injunction against further water runoff exceeding its historical rate before defendants improved their property. The trial court held a bench trial on damages and accepted expert witness William Lawrence's valuation of the trees killed by flooding and the cost of restoration. The trial court awarded plaintiffs $79,948.50, based on trebling of that evaluation. The trial court then awarded plaintiffs $13,957.80 in case evaluation sanctions.

Defendants first argue that the circuit court erred in granting plaintiffs' motion for summary disposition on their trespass count. We disagree.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the nonmoving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*., 120. To recover for common-law trespass, a plaintiff must prove "an unauthorized direct or immediate intrusion of a physical, tangible object onto the land over which the plaintiff has a right of exclusive possession." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). "[A] 'direct or immediate' invasion for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical intrusion of the plaintiff's land." *Id*., 71. Damages may be recovered for "any *appreciable* intrusion." *Id*., 72 (emphasis in original). This invasion may occur by surface water diversion. See *Kernen v Homestead Dev Co*, 232 Mich App 503, 512; 591 NW2d 369 (1998); see generally *Robinson v Wyoming Twp*, 312 Mich 14; 19 NW2d 469 (1945).

"Surface waters" are "'waters on the surface of the ground usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence.'" *Kernen, supra* at 512 n 7, quoting *Fenmode, Inc v Aetna Cas & Surety Co*, 303 Mich 188, 192; 6 NW2d 479 (1942). It is manifest that owners of a "lower or servient estate must receive the surface water from the upper or dominant estate in its natural flow." *Bennett v Eaton Co*, 340 Mich 330, 335-336; 65 NW2d 794 (1954); *Schmidt v*

[1] We will refer to defendants-appellants Whitcomb, Panos, and CMC collectively as defendants.

Eger, 94 Mich App 728, 738; 289 NW2d 851 (1980). But a landowner may not divert surface water to adjoining property by artificial means where that water had not previously flowed to the latter property. See *Allen v Morris Bldg Co*, 360 Mich 214, 215-217; 103 NW2d 491 (1960); *Feldkamp v Ernst*, 177 Mich 550; 143 NW 887 (1913). Liability may be imposed for artificial water diversion. See *Finkbinder v Ernst*, 135 Mich 226; 97 NW 684 (1903).

Here, plaintiff Kyriacos Philippou testified that his property never had "standing water" on it, that water did not historically travel from a culvert under Michigan Avenue to his property via the CMC property, and any water exiting the culvert in fact pooled on the CMC property. Defendants presented testimonial evidence indicating that the natural flow of the water from the culvert historically flowed across a "low area" on the CMC property and onto plaintiffs' property. This raises a genuine question of fact whether there was *any* historical flow of water from defendants' property onto plaintiffs' property. However, defendants themselves provided testimony and argument that they willfully and deliberately authorized a change of conditions on their land that was intended to enhance the flow of water across their land. "[T]he owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water." *Lewallen v Niles*, 86 Mich App 332, 334; 272 NW2d 350 (1978); see also *Allen, supra* at 217; *Bennett, supra* at 336; *Schmidt, supra* at 738. This willful clearing, "causing waters in excess of natural flowage . . . to be channeled and concentrated onto plaintiffs' property to their damage, is enough to warrant recovery for plaintiff[s]." *Allen, supra* at 217.

Defendants authorized a change of conditions on their land, placing a greater burden on plaintiffs' land by increasing the volume and velocity of the surface water. *Lewallen, supra* at 334; see also *Bennett, supra* at 336; *Schmidt, supra* at 738. Defendants contend that the Washtenaw County Road Commission was the party actually responsible for making the changes to the property. However, to be adjudged liable, an actor "must have taken some action or position in furtherance of the trespass." *Kratze v Independent Order of Oddfellows*, 190 Mich App 38, 45; 475 NW2d 405 (1991), rev'd in part on other grounds 442 Mich 136 (1993). Defendants' authorization was sufficient to give rise to their liability, so the trial court's grant of summary disposition was appropriate.

Defendants next argue that the circuit court erred in computing plaintiffs' damages for the trespass. We agree.

"We review the trial court's findings of fact in a bench trial for clear error and conduct a review de novo of the court's conclusions of law." *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). An award of damages is reviewed for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Where the harm to property from a trespass is permanent, damages are measured by the value of the property after the harm as compared to the value before the harm; if the harm is reparable, damages are measured by the cost of restoring the property to its original condition. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997); *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 148-149; 500 NW2d 115 (1993) [hereinafter "*Kratze II*"]. Ultimately, however, compensation for the injury is the lodestar, and "whatever method is most appropriate to compensate a plaintiff for the loss may be used." *Kratze II, supra* at 149.

We conclude that defendants' first argument, that the circuit court employed the wrong standard for calculating damages, is without merit. The court correctly observed that "[t]he appropriate measure of damages is . . . the cost of restoring the property to its original condition." Upon granting plaintiffs summary disposition on their trespass claim, the court enjoined defendants' maintenance of the low area to drain surface water onto plaintiffs' property. It was thereafter established that plaintiffs' property was "essentially dry" as a result of the injunction. Because the court required the removal of the trespass, abating the trespass, plaintiffs' injury is reparable and "the proper measure of damages is the cost of restoration of the property to its original condition . . . ." *Kratze II, supra* at 149. The court did not err.

Defendants next argue that the trial court erred in adopting Lawrence's damage calculation. We disagree. Lawrence testified that 152 trees were killed by the flooding onto plaintiffs' property. He calculated the total value of these trees at $27,599, using a four factor evaluation method for each individual tree. Through examination of a tree's size, Lawrence created a basic value factor, which he then reduced according to that tree's species, condition, and location factors. The "species factor" is a function of issues surrounding a particular species of tree, such as its lifespan, quality, and susceptibility to disease and pests. Defendants assert that Lawrence overvalued the trees because any development would take place precisely where the flooding occurred and the trees were destroyed, so they would require removal in any event. However, the proper measure of damages was the cost of *restoration* of the property, under which any purported intent to develop the property later would be irrelevant. Nevertheless, Lawrence's analysis included a "location factor" that devalued the trees according to the potential for clearing and development. This actually operated in defendant's favor. Defendants are therefore not an aggrieved party as to this issue. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006).

Moreover, defendants presented no evidence of what development would or could actually take place, beyond showing that development was well-suited to the flooded area, but not impossible elsewhere on the property. Defendants' argument would have required the trial court to speculate as to the nature of damages on the basis of purely potential development. See *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146, 151; 662 NW2d 97 (2003) (noting that speculative damages are not permitted). The trial court properly refrained from doing so.

Defendants argue that the trial court clearly erred in failing to reduce the damages award according to Lawrence's testimony regarding the "species factor." We agree. Lawrence testified that because of the Emerald Ash Borer beetle, "anywhere from 80 to 100 percent" of plaintiffs' ash trees would have died despite the increased flooding. He testified that the nature of plaintiffs' property, as a wooded area, made it susceptible to this pest. Moreover, Charles Schmidt, a property owner directly across from plaintiffs' property, testified that every ash tree on his property had died in the past year and a half. Lawrence explained to the trial court that approximately fifty percent of the ash trees in Washtenaw County were infected, but he offered testimony, *specifically tailored to plaintiffs' property*, that the ash tree mortality rate would ultimately be between 80 and 100 percent on that property. This latter calculation would have been the proper standard to utilize in reducing the damage award. The court instead relied on the infection rate for the eastern half of Washtenaw County generally, failing to account for the unique characteristics of plaintiffs' property and awarding plaintiffs greater damages than supported by plaintiffs' own expert. The record shows that the mortality rate for plaintiffs' ash

trees would have been substantially higher than that recognized by the court. The court's finding was therefore clearly erroneous. *Rymal v Baergen*, 262 Mich App 274, 317; 686 NW2d 241 (2004).

Defendants next argue that the trial court erred in awarding plaintiffs treble damages pursuant to MCL 600.2919(1). We disagree. Again, we review the trial court's findings of fact for clear error. MCR 2.613(C). Defendants contend now, as they did below, that they did not intend to cause a trespass, and they point out that the trial court found they did not intend to destroy plaintiffs' trees. Imposition of treble damages requires a showing "that the trespass was intentional and with knowledge that it was without right." *Kelly v Fine*, 354 Mich 384, 387; 92 NW2d 511 (1958) (construing CL 1948, § 692.451, a predecessor statute with substantially identical language). If the trespass "was casual and involuntary," treble damages are inappropriate. MCL 600.2919(1)(c); see *Embrey v Weissman*, 74 Mich App 138, 141; 253 NW2d 687 (1977).

As discussed, defendants intentionally acted to "enhance the flow" of water across their land and onto plaintiffs' land. "However, a trespasser's good faith and honest belief that he possessed the legal authority to commit the complained-of act are sufficient to avoid treble damage liability." *Governale v City of Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975). The trial court found that defendants did not seek or obtain plaintiffs' permission to increase the flow of water across plaintiffs' land. "Legal authority" either means *statutory* authority or, by the plain language of the statute, "that the defendant had probable cause to believe that the land on which the trespass was committed was his own." See *id*., 759-760. We are not aware of any applicable statutes granting defendants authority to increase the flow of water across another's property. We have not been presented with any evidence supporting a good faith belief by defendants that they owned plaintiffs' property, that they were given permission to increase the water flow across plaintiffs' property, or that they had reason to be unaware that "enhancing the flow" of water across their land would not result in more water running onto neighboring land. It is irrelevant whether defendants intended the eventual consequences of their intentional trespass. We therefore do not find the trial court's conclusion of fact clearly erroneous.

Finally, defendants argue that the court's case evaluation sanctions award should be reversed. We agree. Our resolution of the above issues requires further proceedings to recalculate plaintiffs' damages. The propriety of case evaluation sanctions will depend on the court's resolution of that issue, so we reverse the court's order. See MCR 2.403(O)(1). However, this reversal should not be construed as a limitation on the parties' right to seek such sanctions, depending upon the outcome of proceedings on remand.

We affirm the court's grant of summary disposition, and we affirm the trial court's findings of fact regarding trebling of damages. We reverse in part the court's damage award and case evaluation sanctions award, directing it upon remand to make factual determinations concerning plaintiffs' ash tree loss and to adjust plaintiffs' awards accordingly. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis