STATE OF MICHIGAN

COURT OF APPEALS

RICHARD MORSE,

Plaintiff/Counter-Defendant-Appellee,

v

CONSUMERS ENERGY CO,

Defendant,[1]

and

MARC COLITTI and JOAN COLITTI,

Intervening Defendants/Counter-Plaintiffs-Appellants.

UNPUBLISHED
February 22, 2011

No. 292688
Barry Circuit Court
LC No. 08-000009-CH

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the trial court entered a judgment indicating that defendants had no cause of action for damages related to their alleged easement right to place a power pole on plaintiff's property. The court did award defendants equitable relief for erosion and water runoff caused by plaintiff's construction project. Defendants appeal as of right. We affirm.

The parties are neighbors. Defendants own a rental home that had electrical service supplied by an overhead wire from a power pole located on plaintiff's property. In 2007, defendants had the electricity disconnected while the home was being renovated. While the electricity was disconnected, plaintiff had Consumers Energy remove the power pole from his property so that he could build a new garage. Because the power pole was removed, reinstallation of electrical service to defendants' rental home was delayed while Consumers

[1] Consumers Energy was dismissed from this case before trial. For ease of reference, this opinion will use the term "defendants" in referring to Marc and Joan Colitti.

attempted to find an alternative route to run wiring for service. At trial, defendants alleged that plaintiff interfered with their prescriptive-easement rights. The trial court ruled that defendants did not have a cause of action against plaintiff for damages related to removal of the power pole.

On appeal, defendants first contend that they had a prescriptive easement and that the trial court erred in finding that they had no cause of action against plaintiff for damages related to their loss of electrical service. We review a trial court's factual findings in an action for a prescriptive easement for clear error, while the court's ultimate holding is reviewed de novo. *Mulcahy v Verhines*, 276 Mich App 693, 698; 742 NW2d 393 (2007). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

"An easement is a right to use the land of another for a specific purpose." *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). "An easement by prescription arises from a use of the servient estate that is open, notorious, adverse, and continuous for a period of fifteen years." *Id*. at 258-259. "The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the [opposing party's] property was of such a character and continued for such a length of time that it ripened into a prescriptive easement." *Mulcahy*, 276 Mich App at 699.

We find that defendants failed to prove that they had a prescriptive-easement right to place the secondary power pole on plaintiff's property. The evidence showed that at some point before the parties owned their respective properties, Consumers installed the pole and then used and maintained it over the years to provide electrical service to defendants' rental home. The pole was installed and used in the context of Consumers' business enterprise. The easement belonged to Consumers, and if plaintiff interfered with Consumers' easement, Consumers would be the party entitled to damages, not defendants. We find that the trial court did not err in finding that defendants had no cause of action against plaintiff for damages associated with the delayed reinstallation of electrical service.

Next, defendants argue that the trial court erred in failing to award monetary damages for plaintiff's trespass onto their land. At trial, defendants alleged that plaintiff constructed his garage in a manner that caused eroded sediment and water to run onto their property. Defendants also alleged that when plaintiff built a speed bump on the roadway that abuts both parties' properties, he caused water to run into defendants' driveway and garage. The trial court found that the erosion amounted to a trespass and awarded defendants equitable relief. The trial court ordered plaintiff to remove the speed bump but concluded that it was unclear whether the speed bump caused water runoff onto defendants' driveway and into their garage.

Defendants contend that the trial court should have awarded monetary damages for trespass. "This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo." *Alan Custom Homes, Inc*, 256 Mich App at 512. We review a trial court's determination of damages for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

> Recovery for trespass to land in Michigan is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. [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 invasion of the plaintiff's land. Damages may be recovered for any *appreciable* intrusion. . . . Surface water diversion may effect an intrusion onto land. [*Boylan v Fifty-Eight Limited Liability Company*, ___ Mich App ___; ___ NW2d ___; 2010 WL 3488995 (2010) (internal citations and quotations marks omitted; emphasis in original).]

We find that the trial court did not clearly err in declining to award damages to defendants for the trespass caused by plaintiff's construction of his new garage. *Marshall Lasser, PC*, 252 Mich App at 110. There was no proof of a "direct or immediate invasion" of defendants' land because the evidence did not support that plaintiff "knew or reasonably should have known" that his construction would result in a physical invasion of defendants' land. *Boylan, supra*; see also *Adams v Cleveland Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Evidence at trial showed that, after defendants complained to the zoning administrator about erosion, plaintiff took numerous precautions to prevent further erosion and runoff onto defendants' property. Plaintiff worked with an excavator and considered his advice while completing the construction. Plaintiff followed the zoning administrator's requirements. He obtained all the necessary zoning permits for the project, installed a wooden fence and attached silt fencing and landscaping fabric in an effort to prevent any runoff or erosion, and installed commercial eaves on the garage to catch water from the roof and divert it to the back of his property. He also seeded the area between the garage and defendants' property. Plaintiff installed fill dirt because the zoning administer required him to, and he attempted to slope the land near defendants' property back toward his own property so that eroded soil and runoff would remain on his land. The zoning administrator approved plaintiff's project and the erosion-control measures that he put in place.

With respect to the speed bump and resulting water in defendants' driveway and garage, we hold that the trial court did not clearly err in finding that there was insufficient evidence to show that the speed bump was the source of the water runoff. Evidence at trial showed that defendants had an ongoing problem with water in their driveway and garage long before plaintiff installed the speed bump. Defendants previously blamed other neighbors' projects for the runoff problem. Defendants' garage was approximately two feet below road level. Further, plaintiff testified that Marc Colitti supported his plan to build the speed bump, and evidence showed that there were previous speed bumps installed near the same location. In addition, plaintiff performed work on a catch basin to try and divert water off the roadway and toward the lake. We conclude that the evidence does not support that plaintiff knew or reasonably should have

known that constructing the speed bump would have caused a trespass onto defendants' property.[2]

Defendants also argue that they are entitled to treble damages for trespass pursuant to MCL 600.2919(1)(b) and (c). However, because this argument was not raised, addressed, or decided in the trial court, it was not preserved for our review and we decline to address it. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (2008) ("Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute."). Notwithstanding, even if we were to address this issue, we find the statute is wholly inapplicable to the present case and defendants' argument lacks all merit.

Next, defendants contend that the trial court's order rendered the zoning ordinance nugatory. After reviewing the record, we disagree. The trial court found that plaintiff regraded his property in a manner that caused runoff onto defendants' property in violation of the zoning ordinance. The trial court ordered plaintiff to regrade his property to the original grade in the area causing runoff and to take measures to prevent discharge and runoff. To the extent that defendants argue that plaintiff has failed to comply with the trial court's order, defendants should move for a motion to enforce the judgment in the trial court.

Next, defendants argue that the trial court erred in failing to find that plaintiff's new garage amounted to a nuisance per se because it exceeded the height restrictions set forth in the zoning ordinance. "Whether an allegedly injurious condition constitutes a nuisance per se is a question of law. . . . However, whether an allegedly injurious condition constitutes a nuisance in fact is a question of fact." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269; 761 NW2d 761 (2008).

A nuisance per se is "an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Id*. at 269 n 4 (internal citations and quotation marks omitted). A party is liable for private nuisance if:

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995) (internal citation and quotation marks omitted).]

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[2] Moreover, defendants' allegation of approximately $250 in damages to their garage's "driveway area" was not supported by sufficient evidence. Nor did defendants provide sufficient evidence to support their claim that plaintiff interfered with a land survey, and they did not argue below that they were entitled to recover damages to pay for a second survey.

We find that defendants failed to prove that plaintiff committed a private nuisance when he constructed his two-story garage. Defendants did not offer any evidence to prove the elements of private nuisance. Specifically, defendants did not offer any evidence to show that the height of the garage interfered with one of their property rights, or to show that the height resulted in significant harm, or to show that any alleged invasion was intentional, negligent, reckless, or ultrahazardous. *Id*. Defendants' counsel even conceded the nuisance claim during his closing argument when he stated that he was not going to discuss the "zoning violation issue." Defendants did not prove that plaintiff's conduct in constructing the two-story garage amounted to a nuisance.

Finally, defendants' argument that plaintiff's garage caused damages in that it reduced the value of their property is improperly before this Court for decision because there was no evidence offered at trial concerning the diminution of defendants' property value. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal").

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher