STATE OF MICHIGAN

COURT OF APPEALS

KENDALL L. BOUTWELL and LOUISE S. BOUTWELL, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED March 19, 2013
v	No. 308713 Eaton Circuit Court
DAVID J. SMITH and PEGGY F. SMITH, Defendants-Appellees/Cross-Appellants.	LC No. 09-000492-CZ

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Plaintiffs appeal by right a final judgment awarding them damages in the amount of $2626.56.[1] Defendants cross-appeal, challenging the award of attorney fees. We affirm in part, vacate in part, and remand.

Plaintiffs and defendants share a property line along wooded acreage plaintiffs owned. Mr. Smith told Mrs. Boutwell that he planned to put up a fence along their shared property line. An old fence that ran through and around trees previously determined the line. Plaintiffs and defendants offered conflicting testimony as to the scope of the conversation. Mrs. Boutwell gave no express permission to Mr. Smith to enter plaintiffs' property, but Mr. Smith testified that she gave him implied permission based on the fact that she knew that he was removing the old fence that was partially on plaintiffs' property. Mr. Smith further claimed that he believed he had permission to enter the property because he told Mrs. Boutwell to have Mr. Boutwell call him back if there were any problems, but Mr. Boutwell never called.

Plaintiffs drove past the property line and noticed a large brush pile, and on further investigation they found defendants' son on a bulldozer clearing the property line. Plaintiffs claim that there were significant trees removed and damage all down the shared property line.

[1] The court dismissed the claims against Peggy Smith, but she remains a party to the appeal based on the issues raised by plaintiffs.

Plaintiffs sued defendants, alleging trespass and negligence. The jury found Mr. Smith guilty of trespass and awarded plaintiffs $2,626.54 in untrebled damages. The jury further found that Mr. Smith did not have implied permission to enter onto the property, but that Mr. Smith either acted in good faith with an honest belief that he had permission to remove the trees or, at most, that he was merely negligent. Subsequently, the court denied plaintiffs' motions for a new trial, judgment notwithstanding the verdict, and additur.

I. MOTION FOR A NEW TRIAL AND/OR ADDITUR

Plaintiffs argue that the trial court abused its discretion in denying their motion for new trial and/or additur to correct the inadequate damages award. Plaintiffs assert that the award was inadequate based on the jury's failure to treble damages and its disregard for all expert testimony. Because we find that the trial court did not abuse its discretion, we affirm.

We review the trial court's decision on a motion for a new trial and/or additur for an abuse of discretion. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). The trial court commits an abuse of discretion when its decision falls "outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Plaintiffs sought treble damages based on a theory of trespass pursuant to MCL 600.2919(1), which allows treble damages if wood, trees, or land is damaged or cut down without the permission of the owner. To impose treble damages, plaintiffs must show "that the trespass was intentional and with knowledge that it was without right." *Boylan v Fifty Eight, LLC*, 289 Mich App 709, 725; 808 NW2d 277 (2010)(citation omitted). "[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). Treble damages may not be awarded if a trespasser was merely negligent. *Boylan*, 289 Mich App at 726.

First, plaintiffs argue that the trial court abused its discretion in not granting the motion for a new trial pursuant to MCR 2.611(A)(1)(c), which permits the court to grant a new trial when it appears "[e]xcessive or inadequate damages . . . have been influenced by passion or prejudice." "Although the trial court should consider a number of factors, such as whether the verdict was induced by bias or prejudice, the trial court's inquiry is limited to objective considerations related to the actual conduct of the trial court or the evidence presented." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003).

Though plaintiffs rely on MCR 2.611(A)(1)(c) as grounds for a new trial, nowhere in their brief on appeal do plaintiffs cite any evidence to show that the damages award was "influenced by passion or prejudice." Furthermore, plaintiffs never argued in their motion for a new trial that there was passion or prejudice in the court below. An appellant cannot announce a position and leave it to this Court to rationalize the basis for its claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Moreover, there is no evidence, discussion, consideration, or even hint that there was ever any prejudice or passion influencing the verdict. Therefore, the trial court did not abuse its discretion in denying plaintiffs' motion for new trial pursuant to MCR 2.611(A)(1)(c).

Second, plaintiffs argue that the trial court abused its discretion in not granting the motion for new trial pursuant to MCR 2.611(A)(1)(d) and (g); however, plaintiffs did not present this issue in their questions presented on appeal. Because the arguments based on (d) and (g) are not in the statement of questions involved on appeal, MCR 7.212(C)(5) and are not preserved for appeal, we decline to review them. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). At any rate, plaintiffs' arguments are not persuasive. The trial court did not abuse its discretion in denying the motion for new trial pursuant to MCR 2.611(A)(1)(d) for the same reasons we outline in our discussion regarding plaintiffs' motion for additur. Plaintiffs offer no legal support for their claim under MCR 2.611(A)(1)(g) that the testimony of defendants' son was speculative, so its admission was an error requiring a new trial. We will not support and rationalize a party's claim. *Wilson*, 457 Mich at 243.

Nor did the trial court abuse its discretion in denying plaintiffs' motion for additur. A trial court in considering such a motion "is limited to objective considerations regarding the evidence adduced and the conduct of the trial." *Setterington*, 223 Mich App at 608. We will uphold a verdict where a logical interpretation of the evidence explains the jury's findings. *Hill v Sacka*, 256 Mich App 443, 461; 666 NW2d 282 (2003).

Defendants introduced evidence that they contacted plaintiffs and told them about the fence. This conversation was supported by the testimony of three individuals. There was evidence that Mr. Smith asked plaintiffs to call him back if there were any concerns or problems. Both Mr. Smith and his son testified that they felt they had implied permission to enter on the property to clear around the fence row. The jury believed that Mr. Smith trespassed and that he did not have implied permission to do so, but it also found that he did it in good faith or that his actions were merely negligent. It is for the jury to weigh the evidence and determine the credibility of witnesses, and it may choose to believe or disbelieve any testimony. *Guerrero v Smith*, 290 Mich App 647, 669; 761 NW2d 723 (2008). Because Mr. Smith elicited testimony that indicated that he was, at most, merely negligent in his actions, the testimony can logically explain the jury's decision not to treble damages. *Hill*, 256 Mich App at 461; MCL 600.2919(1).

Nor was additur required based on the jury's valuation of the trees. Again, plaintiffs' argument merely attacks the jury's decision to believe the testimony of defendants' witnesses over theirs. We defer to the jury's determination on the credibility of witnesses, the weight that it gives to testimony, and the adequacy of the damage award. *Guerrero*, 290 Mich App at 669; *Heaton v Benton Constr Co*, 286 Mich App 528, 538-539; 780 NW2d 618 (2009). There was evidence to support a finding that plaintiffs' expert significantly over calculated the amount of damages. Defendants' expert testified that there was no evidence that trees as large as 24 inches in diameter were actually removed. There were no stumps, no holes in the canopy, and no evidence of holes in the ground. Moreover, defendants' son admitted to removing eight to 10 trees, but none larger in circumference than a baseball. Defendants' expert also testified to errors in the valuation methods used by plaintiffs' expert. The testimony defendants' expert submitted could allow a jury to disbelieve plaintiffs' expert and provides a logical explanation for the damages the jury awarded. *Hill*, 256 Mich App at 461. Therefore, the trial court did not abuse its discretion in denying the motion for additur.

II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Plaintiffs argue that the trial court erred in denying its motion for judgment notwithstanding the verdict because the evidence required an award of treble damages in favor of plaintiffs. Plaintiffs assert that the evidence submitted at trial clearly showed that Mr. Smith intentionally entered onto their land, so the jury erred in not trebling the damages. Because we find that defendants submitted sufficient evidence to show that they either acted in good faith or, at worst, with mere negligence, we affirm.

We review de novo the trial court's decision on motion for judgment notwithstanding the verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). The trial court should grant a motion for judgment notwithstanding the verdict only if the evidence viewed in the light most favorable to the nonmoving party does not establish a claim as a matter of law. *Id*. The court's focus should be on the sufficiency of the evidence to support the claim, not solely on the jury's ultimate finding. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999).

Plaintiffs first argue that there was no evidence to support a finding that treble damages were not required under MCL 600.2919. Accordingly, plaintiffs testified that they never gave permission to Mr. Smith to enter the land and remove the trees and that Mr. Smith never asked them for permission. But to avoid treble damages, defendant did not need to introduce evidence that Mr. Smith had implied permission to remove the trees. Evidence that he acted in good faith or was merely negligent was sufficient. *Boylan*, 289 Mich App at 725-726. There was sufficient evidence to find that Mr. Smith acted in good faith or, at most, was merely negligent. Both Mr. Smith and his son testified that they thought that plaintiffs' failure to call them about the fence meant that they had implied permission to remove the trees. There was evidence to support a finding that Mr. Smith felt that he had permission to clear around the old fence to install a new fence. Hence, there was sufficient evidence for a jury to conclude that treble damages were not required because Mr. Smith acted in good faith with an honest belief that he could remove the trees or that, at most, he was merely negligent. The trial court did not err in denying the motion for judgment notwithstanding the verdict. *Sniecinski*, 469 Mich at 131.

Plaintiffs also argue that the trial court should have granted the motion for judgment notwithstanding the verdict because there was no evidence to support a damages award other than the amount testified to by plaintiffs' expert. While plaintiffs both testified to there being trees in that area over 24 inches in diameter, and plaintiffs' expert agreed with this statement, there was evidence to support a finding that plaintiffs' expert significantly over calculated the amount of damages. Defendants' expert agreed that there were trees that size in the woods but testified that there was no evidence that trees that large were actually removed. There were no stumps, no holes in the canopy, and no evidence of holes in the ground, all of which would be present if trees that large were removed. Moreover, defendants' son admitted to removing eight to 10 trees but none larger in circumference than a baseball. Defendants' expert also testified that plaintiffs' expert used an unconventional method for valuing the trees and a small sample size comprised of trees significantly larger than what a small bulldozer would likely be able to remove. Accordingly, there was sufficient evidence for a jury to accept the calculations, expert, and testimony defendants submitted and over that of plaintiffs and their expert. The trial court did not err in denying plaintiffs' motion for judgment notwithstanding the verdict.

III. ATTORNEY FEES

On cross-appeal, defendants argue that the trial court abused its discretion in awarding attorney fees for case evaluation sanctions based on a contractual rate of $150 per hour instead of the reasonable rate of $250 per hour. We conclude that the trial court abused its discretion in so doing, vacate that portion of the judgment awarding attorney fees, and remand for reconsideration of this issue.

The parties do not dispute that defendants were entitled to case evaluation sanctions pursuant to MCR 2.403(O)(1) of the number of hours defendants' attorney worked on the case. But the parties dispute the trial court's finding that $150 per hour was the reasonable hourly rate based on *Furness Golf v RVP Develop*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2009 (Docket Nos. 279398 and 279399). The trial court concluded that both $150 and $250 an hour were reasonable hourly attorney rates, but it relied on *Furness* in holding that the intent of the court rule was best served by awarding the contractual rate the insurance company paid defense counsel.

Under MCR 2.403(O)(1), plaintiffs must pay defendants "actual costs." MCR 2.403(O)(6)(a)-(b) governs "actual costs" and reads as follows:

> (6) For the purpose of this rule, actual costs are
>
> > (a) those costs taxable in any civil action, and
> >
> > (b) a reasonable attorney fee based on a reasonably hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

When evaluating a reasonable hourly rate for an attorney fee, "the trial court should consider relevant criteria, including 'the professional standing and experience of the attorney; the skill, time, and labor involved; the amount in question and the results achieved; the difficulty of the case; the expenses incurred; and the nature and length of the professional relationship with the client.'" *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002), quoting *Temple v Kelel Distrib Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990). "Reasonable fees are not equivalent to actual fees charged." *Id*.

It is clear that the trial court could have awarded defendants attorney fees at the rate of $250 per hour, which it found reasonable, despite defense counsel's admitting that the insurance company paid him $135 to $150 per hour. But the court relied on *Furness* in setting the rate at $150 per hour. *Furness* dealt with an intervening insurance company which had rights based solely on the express language of an insurance contract. *Furness*, unpub op at 5-6. The *Furness* Court rejected the argument that the case evaluation court rule expanded the rights of the insurance company, holding that the court rule could not expand the rights of an unambiguous contract. *Id*. at 5. This left the intervening insurance company solely with the right to all or part of the fees it paid to defend the insured. *Id*. In this case, defendants, who were properly awarded case evaluation sanctions, derived their rights from MCR 2.403(O) rather than an insurance contract. Pursuant to MCR 2.403(O)(6)(b), defendants were entitled to reasonable attorney fees. Reasonable attorney fees are not the equivalent to actual contractual fees. *Zdrojewski*, 254 Mich App at 72.

The trial court should consider what attorney fees are reasonable in light of the reasonableness factors. *Id*. In doing so, the court is not limited to the contractual rate paid by the insurance company. The trial court determined that both $150 an hour and $250 an hour were reasonable rates. On remand, we direct the trial court to determine which rate is the most reasonable in light of all relevant factors.

We affirm the jury verdict but vacate that portion of the judgment awarding attorney fees and remand for reconsideration of that issue in accordance with this opinion.

We affirm in part, vacate in part, and remand. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck