

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

REBECCA FENSKE,)	
)	No. 64478-5-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
STEVE TEGMAN and DEYONNE))	UNPUBLISHED OPINION
TEGMAN, husband and wife, and)	
the marital community thereof,)	
)	
Respondents.)	FILED: September 20, 2010
_____)	

Leach, A.C.J. — After years of periodic flooding in her basement, Rebecca Fenske sued her neighbors, Steve and Deyonne Tegman, for damages and injunctive relief. The trial court awarded her restoration damages and ordered the Tegmans to install a new drainage system on their property. Fenske appeals, arguing that the court should have also awarded damages for the lost use of her basement and the diminished value of her residence. We affirm.

FACTS

Rebecca Fenske has lived in her Kirkland home since 1985. In 1988, her basement flooded after drainage pipes on adjacent property now owned by Steve and Deyonne Tegman were crushed by a developer. The developer

repaired the pipes and, except for one incident involving moisture in her basement, Fenske's basement remained dry until 2005.

In December 2005, Fenske's basement started flooding periodically. Two years later, she filed this action against the Tegmans. The complaint alleged in part that the flooding was caused by an obstruction in the Tegmans' drainage system, that the Tegmans had breached a duty to repair that system, and that their breach caused damages to be proved at trial. Fenske requested injunctive relief in the form of an order requiring the Tegmans to install an engineered drainage system.

Before trial, the court ruled that the Tegmans owed and breached a duty to Fenske to provide adequate drainage and that their breach caused flooding on Fenske's property from December 2005 through May 2009. The case then proceeded to trial on the issues of damages and injunctive relief.

Fenske testified that the damage to her property included property damage and loss of the intended use of her basement. Her expert witness, Richard Hagar, testified that the flooding diminished the property's value because it would have to be disclosed to any prospective purchaser. He estimated the diminution in value was between 17 and 25 percent of the property's fair market value. This estimate assumed that the drainage problems would not be remediated. Hagar offered no testimony as to what the property's value would be if remediation occurred. He stated, however, that some diminution in value would remain after remediation but would likely become

“unmeasurable” within five years.

During closing arguments, the court requested a status report on repairs the Tegmans were making to the drainage system on their property. The Tegmans’ counsel responded that the city had approved the drainage plan and the work was scheduled to be completed by the end of the month.

The court entered judgment for Fenske, granting her both injunctive relief and damages. It ordered the Tegmans to install and complete an approved drainage system by October 31, 2009. It awarded Fenske \$10,096 in damages for clean up expenses, damage to and restoration of personal property, storage unit rental expenses, and labor costs. The court found that the value of Fenske’s alleged loss of use of the basement and the diminution in her property value were both “\$0.” The court explained these findings in its oral ruling,

[L]oss of use of basement as a residential property - - it was valued at none. And let me just comment on that. I think Mr. Johnson had it totally right here. Historically, this was never used as a residence. Historically, according to the testimony, it was never going to be used as a residence. It just - - there’s no basis for any award in that area. The basement was used historically for storage and it has continued to be used as a storage facility albeit now with a better wrapping system. Things are just not on the ground.

That gets us to the tough issue This property began with a storm, a natural drainage way running through it. And it is today - - has that drainage system albeit one that’s diverted and channeled. With the correction of the system, it’s the conclusion of this Court that, in fact, the property has the same value today that it had before the storms of 2005.

It would have been appropriate, I believe, to disclose this drainage way before the storms of 2005, and it’s appropriate to disclose it now. I suppose today it’s probably legally mandated.

But the reality is that Ms. Fenske’s property is burdened with this drainage system, drainage way. It was before these incidents

and is now a burden (inaudible) as is the Defendants' property. There is no basis for this Court to award a diminution of value based on these facts, and I declined to do so.

Fenske appeals.¹

DECISION

Fenske challenges the court's findings valuing her loss of use and diminution in property value at "\$0." We review findings of fact for substantial evidence and conclusions of law de novo.²

Fenske first contends she was entitled to damages for lost uses of her basement. She claims the court's findings to the contrary ignore her undisputed testimony that she always intended to use portions of the basement as a bedroom and recreation room and would have done so but for the flooding. But as the trial court noted in its oral ruling, her actual use of the basement indicated otherwise. In the 20 years preceding the onset of the flooding, Fenske never finished the basement and used it only as a storage and utility space. This history undermined her claims at trial.

In addition, her testimony indicated she would not have finished the basement or used it any differently until she first built a detached garage. Fenske testified that she had hoped to build a detached garage, but "without a garage, the basement is everything that you would do with a garage." She kept

¹ Fenske has moved to strike portions of the Tegmans' brief referring to pretrial settlement negotiations and posttrial improvements to their drainage system. The motion is granted.

² Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

numerous items in the basement that would normally be kept in a garage, including tools, a workbench, and “a lot of building materials” such as rolls of insulation, paint, “you name it.” She also had furniture stored on her front porch and in a rented storage room that she wanted to store in the basement. This evidence indicates that even in the absence of flooding, Fenske would not have used the basement any differently unless and until she built a garage.³ In short, the court’s finding regarding the value of Fenske’s alleged lost uses is supported by substantial evidence.⁴

Fenske also contends the court erred in failing to award her damages for the diminished value of her residence. She failed, however, to establish the requisite injury for such damage. In general, diminished value damages are available only when property suffers a permanent injury:

If the injury is permanent, the general rule applicable is the difference between the market value of the property immediately before the damage and its market value immediately thereafter. If . . . the property may be restored to its original condition the measure of damages is the reasonable expense of such restoration, and in a proper case the loss of use or of income therefrom for a reasonable time pending such restoration.^[5]

³ We note that the court compensated Fenske for lost storage space by awarding her damages for the amount she spent on a rented storage unit.

⁴ The persuasiveness and credibility of evidence are matters for the trier of fact and will not be reviewed on appeal. State v. Ainslie, 103 Wn. App. 1, 6, 11 P.3d 318 (2000). Moreover, because the trial court viewed the premises, it was in a better position than this court to evaluate the issues surrounding the loss of use claim. See Riblet v. Spokane-Portland Cement Co., 45 Wn.2d 346, 349-50, 274 P.2d 574 (1954) (having viewed the premises, trial court was in better position than appellate court to evaluate testimony concerning premises).

⁵ Harkoff v. Whatcom County, 40 Wn.2d 147, 152, 241 P.2d 932 (1952); accord, Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 694-95, 132 P.3d 115 (2006). These two measures of damages “are alternatives; an award of both would be a

Here, Fenske presented no evidence that the injury to her property was permanent or that the drainage problems could not be corrected.⁶ Her expert based his opinion regarding diminished value on his assumption that the drainage problem would not be corrected. He expressed no opinion, and Fenske presented no evidence, on whether the drainage problem could be corrected. Nor did he testify that the injury to Fenske's property value was permanent. Although he concluded the property's value had diminished and would remain diminished after remediation due to a stigma effect, he also testified that the stigma effect typically dissipates to an "unmeasurable" level within five years of remediation. Because Fenske testified that she had no intention of selling her property and failed to demonstrate that it suffered a permanent injury, the record supports the court's finding that she was entitled to "\$0" in damages for diminution in value.

We reject Fenske's contention that she should not be held to the burden of proof described above because "it was impossible for Mr. Hagar to consider

windfall." Pugel v. Monheimer, 83 Wn. App. 688, 692, 922 P.2d 1377 (1996).

⁶ Examples of the type of evidence necessary to support a claim for diminished value are found in Grant v. Leith, 67 Wn.2d 234, 237, 407 P.2d 157 (1965) (appraiser testified there was "permanent, irreparable damage and depreciation" to property in the amount of \$5,600); Pugel, 83 Wn. App. at 693 ("[A]ccording to the trial court's unchallenged findings of fact, the withdrawal of lateral support caused a loss of market value in Pugel's property that was permanent, not temporary."); Mayer, 156 Wn.2d at 695 ("[T]he Mayers presented unrebutted expert testimony that . . . they had suffered a permanent loss because they will have to disclose that the home is sided with EIFS, a known defective product.") (quoting Mayer v. Sto Indus., Inc., 123 Wn. App. 443, 464, 98 P.3d 116 (2004)).

the Fenske property in a remediated condition, or examine the yet-to-be proposed fix for cost and effectiveness.” During trial, the court and the parties discussed postponing Hagar’s testimony until after the Tegmans installed the new drainage system. This would have allowed Hagar to evaluate the new system and offer an opinion regarding diminution of value after remediation. But after discussing the matter with Fenske off the record, Fenske’s counsel declined to postpone Hagar’s testimony. Counsel also could have requested a continuance or asked the court to reserve ruling until after the new system had been installed and tested by fall rains, but elected not to. Thus, contrary to Fenske’s assertions, she was not precluded from presenting testimony regarding the value of the property after remediation.

We also reject Fenske’s contention that she is entitled to diminished value damages because the Tegmans could have corrected the drainage system years ago when the cause of the flooding was first discovered. Whether the Tegmans were prompt or dilatory in responding to the situation, the test for diminution in value remains the same: there must be proof of permanent injury. As discussed above, there is no such proof in this case. Fenske’s remedy for other damage resulting from the alleged delay was to include it in the damages she requested for restoration and loss of use.

Affirmed.

Leach, a.c.f.

WE CONCUR:

Spencer, J.

Appelwick, J.