COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3109

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ESTELLE EISCHEN,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ROBERT HERING, BRIAN JOSEPH HERING AND MARK CATAROZZOLI,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Robert Hering, Brian Hering and Mark Catarozzoli (collectively, Hering) appeal from a judgment in favor of Estelle Eischen for

damages for removing a stone fence marking the property line between the Eischen and Hering property. Hering claims that Eischen could not maintain an action for damages because Hering is a co-owner of the fence, there was a mistake of fact about the property line, there was insufficient evidence of damages, and Hering's one-half interest in the fence should reduce damages by that much. Eischen cross-appeals from the judgment and argues that the circuit court should have submitted her claim for punitive damages to the jury. We affirm the judgment.

¶2 Robert Hering purchased property bordering Eischen's in 1995. Brian Hering holds an undefined ownership interest as well.[1] Hering believed that a tree line just to the west of the stone fence was the property line and that the stone fence, which ran about 300 feet along the property line and varied between six to four feet in height and twelve to fourteen feet in width, was completely on the Hering property. In April 1997, to alleviate snow and ice buildup on the driveway which ran parallel to the fence, Hering began to clear trees and stones from the fence. Mark Catarozzoli was hired to remove the stone fence with heavy equipment. Several times during this process, Eischen's son informed the Herings and Catarozzoli that the stone fence was the property line and they were not to remove it. The fence was removed over the next six weeks.

¶3 Eischen commenced this action to clear title to her property, to be compensated for removal of the fence and trees from her property, and for trespass. The circuit court determined as a matter of law that the stone fence was a

[1] The third amended complaint alleges that Robert and Brian Hering claim title to the property. The allegation is deemed admitted because not denied in the answer to the third amended complaint. *See* WIS. STAT. § 802.02(4) (1997-98).

boundary fence centered on the property line between the Eischen and Hering properties, and that there was common ownership of the fence. The issues of whether Eischen was damaged by removal of the stone fence and the amount of damages were tried to a jury. The jury found for Eischen and awarded total damages of $11,600 for her loss of the fence and trees.[2]

¶4 Hering first argues that no cause of action can be maintained against a common owner for trespass unless the evidence establishes total destruction of the property held in common. ***Sayles v. Bemis***, 57 Wis. 315 (1883), directly controls. The court held: "The fact that the fence is a line fence makes it unlawful for either of the adjoining owners, as against the other, to remove or tear it down, and the question of ownership is immaterial." ***Id.*** at 321. Eischen could recover for the wrongful removal of the fence, regardless of whether there was total destruction or not.

¶5 Next, Hering suggests that the parties operated under a mistake of fact as to the property line[3] and that a mutual mistake of fact negates any claim by one party against the other. Hering equates Eischen's recovery with unjust enrichment. Reliance is made on ***State v. Bougneit***, 97 Wis. 2d 687, 693, 294 N.W.2d 675 (Ct. App. 1980), which sets forth the analysis for whether a mistake of fact exists: "(1) The facts exist; (2) The sense impressions of facts are different from the real facts; (3) The impressions fit the facts; and (4) The erroneous impressions are accepted as true." Here, however, Hering cannot satisfy the initial fact element—that he had a good faith belief that he owned the fence. There was

[2] No damages were awarded for loss and/or illness of cattle or lost profits.

[3] Eischen believed the fence to be hers because of adverse possession. Hering relied on previous surveys and existing stakes in believing the fence to be wholly within the Hering lot.

evidence that early on in the process of removing the stone fence, Eischen's son told Hering that the fence was Eischen's property or at least that it constituted a line fence not subject to unilateral removal. Hering was on notice that a dispute of fact existed. He no longer had basis for a good faith belief that the fence was his property. A mistake of fact is not a defense.

¶6 The damages are challenged as based on mere speculation and conjecture. "The general rule is that damages must be proved with reasonable certainty and cannot be based on conjecture." ***Novo Indus. Corp. v. Nissen***, 30 Wis. 2d 123, 131, 140 N.W.2d 280 (1966). Yet, "[o]ur review of a jury's verdict is narrow. Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. We consider the evidence in a light most favorable to the jury's determination because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. *See* ***id.*** at ¶39. Where, as here, the circuit court has approved the finding of a jury, we will not overturn the jury's verdict unless we are convinced that there is a complete failure of proof so that the verdict must be based on speculation. *See* ***id.*** at ¶40.

¶7 Eischen's son testified that approximately 126 to 140 trees were removed. He explained that the trees were an equal mix of black cherry and aspen between 2.5 and 4.5 inches in diameter. A certified arborist testified about the cost of similar trees.[4] While the evidence was not itemized with precision, it was

[4] The arborist testified that in 1997, the cost of replacing a 2.5 inch diameter aspen was $240 and that the cost of replacing a 4.5 inch black cherry was $680. He indicated that the cost was about 10% higher at the time of trial and that generally the cost of a tree one-half the sizes he indicated would be about one-half less.

sufficient to permit reasonable jury inferences about the number of trees lost and the cost to replace them. It was not necessary that the amount awarded mathematically match the number of trees Eischen claimed to have lost because the jury was free to accept in part and reject in part the testimony of Eischen's son about the number of trees lost. *See* ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988).

¶8 With respect to the removal of the stone fence, the jury awarded $10,000 compensation. A plumbing and excavating contractor testified that it is difficult to find replacement fieldstone. He indicated that it could cost between $8,500 and $12,221 to replace the fence taking into consideration the cost of materials, trucking expenses, and manual labor needed to assemble the fence.[5] This was credible evidence. No precise mathematical formulation was needed because of the variations in the height and width of the fence. Such variations do not mean that the damages evidence was based on a mere hypothetical.

¶9 Finally, Hering argues that the damages should be reduced by one-half to account for co-ownership. He complains that Eischen will recover more than her ownership interest if the jury award is not reduced. ***Threlfall v. Town of Muscoda***, 190 Wis. 2d 121, 527 N.W.2d 367 (Ct. App. 1994), speaks to Hering's concern. ***Threlfall*** acknowledges that the rule of damages for recovery in trespass "should more carefully guard against failure to compensate the injured party than against possible overcharge to the wrongdoer." ***Id.*** at 133. The cost of restoration

[5] The contractor indicated familiarity with the stone fence along the property line because he used to haul sand and fill to the gravel pit formerly on the Hering property. Although the contractor admitted that he had not viewed the fence in twenty years and had not visited the site in making his estimations, his admission only affects the jury's weight and credibility determination.

is a proper method to measure damages and serves to fully compensate Eischen. *See* ***id.*** at 136. No reduction is needed.

¶10 Eischen wanted the circuit court to submit a jury question on punitive damages. She reasons that Hering received repeated notice from her son that the stone fence was a line fence that should not be removed and that Hering's act of removing the fence in the face of those warnings constitutes an indifference and reckless disregard for the law and rights of others. *See* ***Jacque v. Steinberg Homes, Inc.***, 209 Wis. 2d 605, 628, 563 N.W.2d 154 (1997) (punitive damages proper after several unambiguous warnings not to trespass against the land).

¶11 "Before the question of punitive damages can be submitted to a jury, the circuit court must determine, as a matter of law, that evidence was presented at trial that would support an award of punitive damages. The circuit court should not submit the issue of punitive damages to the jury in the absence of evidence warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite 'outrageous' conduct." ***Sharp v. Case Corp.***, 227 Wis. 2d 1, 20-21, 595 N.W.2d 380 (1999). We independently review the record to determine whether, as a matter of law, punitive damages should have been submitted to the jury. *See* ***id.*** at 21-22. Our focus is on whether the evidence warranted a conclusion to a reasonable certainty that Hering acted with the requisite outrageous conduct. *See* ***id.*** at 22. "A person's conduct is outrageous if the person acts either maliciously or in wanton, willful and in reckless disregard of the plaintiff's rights. A person's conduct is wanton, willful and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on the person's part to the consequences of his or her actions, even though he or she may not intend insult or injury." ***Id.*** at 21.

¶12 Although we have rejected Hering's claim that a mistake of fact was a defense, we did so because Hering lacked a basis for a good faith belief that the fence was undisputedly on his property. However, the absence of a good faith belief does not necessarily equate Hering's conduct with outrageous conduct. The evidence showed that Hering had a reasonable purpose of preventing ice and water buildup on his property as grounds for removing or reducing the stone fence.[6] In no way did Hering's conduct commence with an untoward or reckless purpose. Once Eischen's son warned Hering not to remove the fence, Hering could have waited to resolve the matter by some other avenue. But his failure to do so, and to take the risk that he would be proven in error about the property line, is not maliciousness or a willful disregard of Eischen's rights, which were unclear. Hering may have been negligent in proceeding with the fence removal after the warnings but it was not outrageous conduct. We affirm the circuit court's refusal to submit punitive damages to the jury.

¶13 No costs to either party.

By the Court.—Judgment affirmed.

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[6] ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 146, 384 N.W.2d 692 (1986), recognizes that "society has a strong interest in maintaining developed land without impairing an owner's use and enjoyment of it, whether the use be personal or economic." Thus, Eischen may not have an unlimited privilege to continue the stone fence if it in fact impairs the use of Hering's property. Perhaps Hering's best remedy would have been a suit for private nuisance which could have determined a solution efficient to both properties.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).