COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1241 **Cir. Ct. No. 2006CV365**

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

BETZNER FAMILY, LLC,

PLAINTIFF-RESPONDENT,

V.

MIDWEST AMUSEMENT PARK, LLC AND US ACQUISITIONS & OIL, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Shawano County: FRED W. KAWALSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Midwest Amusement Park, LLC and US Acquisitions & Oil, Inc. (hereinafter Midwest) appeal a judgment establishing a property boundary and awarding compensatory and punitive damages. Midwest

argues the trial court erred by rejecting Midwest's adverse possession defense, awarding punitive damages, and not sufficiently reducing the compensatory damages award. We reject Midwest's arguments on adverse possession and punitive damages and affirm the judgment in those respects. However, we reverse in part the compensatory damages award and remand for the trial court to redetermine the award. Additionally, we sanction Midwest's counsel for misrepresenting the record and citing an unpublished decision.

BACKGROUND

¶2 Midwest purchased real estate abutting the western boundary of Betzner Family, LLC's farmland in Shawano County in June 2003.[1] The Betzners had owned and farmed their property since 1948. Midwest purchased its land from Terry Kralovetz, who constructed a go-cart track after he purchased the land in 1991. Kralovetz, in turn, had purchased the land from Harry Hoppy, who had owned it since 1953. Hoppy and Tom Betzner's father had constructed a fence between the properties. However, Kralovetz, with Tom Betzner's permission, removed the fence and woody vegetation that had grown up around it, so the go-cart track could be seen from a nearby road.

¶3 In 2005, Midwest contracted James Mahoney to excavate its land along the boundary with the Betzner property.[2] Betzner observed the excavation in July and called the sheriff to report a trespass. After he was told nothing would

[1] Midwest subsequently sold the land to US Acquisitions & Oil, Inc. (USA&O), but continued operating the amusement park on the property. Both entities were part of a conglomerate owned by the nonprofit Samanta Roy Institute of Science and Technology (SIST).

[2] Tom Betzner lived on the Betzner Family, LLC property throughout the time of the dispute with Midwest. We therefore refer to Betzner throughout this decision for sake of clarity.

be done without a survey, Betzner hired Michael Nordin, a licensed land surveyor. Nordin surveyed the property and concluded the excavation encroached along the entire length of the boundary by approximately eighteen to twenty feet and up to fifty-one feet at one end. Betzner's attorney then sent a letter to Naomi Isaacson, Midwest's managing member, demanding removal of the fill deposited in the disputed area.[3] The fill was not removed and Betzner filed an action requesting a declaration that Nordin's survey line established the boundary of his property and claiming a trespass and continuing trespass against Midwest.

ANALYSIS

¶4 Midwest first argues it established its affirmative defense of adverse possession of the disputed strip of land. The burden of proof is on the party asserting the claim for adverse possession. ***Allie v. Russo***, 88 Wis. 2d 334, 343, 276 N.W.2d 730 (1979). Further, "[t]he evidence of possession must be clear and positive and must be strictly construed against the claimant. All reasonable presumptions must be made in favor of the true owner." ***Id.*** We will affirm the trial court's factual findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).[4]

¶5 Midwest argues the fence constructed between the abutting properties established the boundary line. Betzner, and ultimately the trial court, agreed with this proposition. What was disputed, however, was the precise

[3] Isaacson, an attorney, was also president of USA&O and board member and CEO of SIST.

[4] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

location of the removed fence. Midwest's position is essentially that Betzner conceded he had always farmed right up to the fence and that the boundary of the cultivated area did not change, and photographs showing some weeds demonstrated that Midwest did not intrude into the farmed portion of the field. Additionally, Midwest relied on the fact a single fence post was recovered.

¶6 However, Betzner testified he farmed only as close to the fence as his equipment would allow.[5] He also opined the thin strip of weeds may have sprouted up at the edge of his crop because the fill had suffocated the plants below it. The fence post was also not determinative. As the trial court noted, it was disputed whether the post was from the north-south fence establishing the boundary or instead from an old fence that ran east-west.

¶7 More importantly, the trial court relied on the evidence concerning a 1991 survey of the Midwest property from when Hoppy was selling the land to Kralovetz. Betzner testified he was in the field when the survey was complete and observed the fence line closely coincided with the survey line, stating it was about a "foot either way." Nordin testified the survey lines in the 1991 and 2005 surveys coincided. He further stated it was his father's practice to note any observed discrepancies between a survey line and fence line and there was no notation on the 1991 survey map.[6]

[5] Midwest blatantly misrepresents the record. It cites the trial court's decision to support its claim Betzner conceded he farmed up to the fence line. It further asserts, "[A]s even the trial court acknowledged, whatever [Midwest] did to alter the landscape, such activity was to the west of the cultivated area, and thus, of necessity occurred on property [Midwest] adversely possessed." The trial court's decision, however, merely restated Midwest's position, which the court then rejected.

[6] Nordin's father was the surveyor who conducted the 1991 survey.

¶8 The trial court explained it gave more weight to Betzner's testimony because he was more familiar with the land compared to Midwest's witnesses, "whose involvement with the property was both brief and relatively recent." We conclude the trial court's determination of the fence's location to be the survey line was not clearly erroneous, especially given the heavy evidentiary burden placed on an adverse possessor.

¶9 We next address punitive damages. Midwest argues in its initial brief that it was improper to award punitive damages because it was not pled and Midwest was not provided actual notice of the claim. In its reply, however, Midwest apologizes and concedes the matter was specifically mentioned twice at trial.[7] Nonetheless, Midwest argues the trial court erroneously exercised its discretion by failing to determine whether Midwest impliedly consented to trying the issue.

> If issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

WIS. STAT. § 802.09(2).

¶10 Generally, the decision whether to amend the pleadings is within the trial court's discretion. ***Hess v. Fernandez***, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. However, the first sentence of WIS. STAT. § 802.09(2) is

[7] Midwest has different counsel on appeal than it did in the circuit court. Nonetheless, it is counsel's responsibility to accurately present the record.

mandatory. ***Hess***, 278 Wis. 2d 283, ¶14. "If there is a determination that the issue was tried by the express or implied consent of the parties, the court must amend the pleadings to conform with the proof presented at trial." ***Id.***

> To determine implied consent, the court must use the test of actual notice, and if it finds no actual notice, it should find no implied consent to try the unpleaded issue. If … the circuit court finds that there was no consent to the trial of the unpleaded issue, it must [then] apply a balancing test and make an "interests of justice" determination.

Id. (citations omitted). Thus, if Midwest had actual notice of the punitive damages claim, Betzner is entitled to have the pleadings amended.

¶11 On the first day of the trial, Midwest raised a relevance objection when Betzner questioned Isaacson about Midwest's assets. Betzner stated it was relevant to punitive damages, and subsequently responded he would make a showing he was entitled to punitive damages. The court then permitted the question. On the second day of the continued bench trial, thirty-two days later, Betzner objected to a question. Midwest responded, "[I]t's relevant because part of the claim here is trespass, and they are claiming punitive damages …."

¶12 While the court did not explicitly state its determination that Midwest had notice of the punitive damages claim, the record plainly indicates Midwest had actual notice. Thus, as a matter of law, Midwest gave implied consent to try the punitive damages issue, *see* ***id.***, ¶21, and the trial court appropriately amended the pleadings to conform to the evidence.[8]

[8] Betzner also argues punitive damages need not be specifically pled in a trespassing action. We need not address this alternative theory for upholding the trial court's decision. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest possible grounds).

¶13 Midwest also argues the record did not adequately support a punitive damages award. Punitive damages may be awarded "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." WIS. STAT. § 895.043. An "intentional disregard" requires that the defendant acted with a purpose to disregard the plaintiff's rights or was aware that his or her conduct was substantially certain to result in the plaintiff's rights being disregarded. ***Wischer v. Mitsubishi Heavy Indus. Am., Inc.***, 2005 WI 26, ¶24, 279 Wis. 2d 4, 694 N.W.2d 320.

> This will require that an act or course of conduct be deliberate. Additionally, the act or conduct must actually disregard the rights of the plaintiff, whether it be a right to safety, health or life, *a property right*, or some other right. Finally, the act or conduct must be sufficiently aggravated to warrant punishment by punitive damages.

Id., ¶24 n.28 (quoting ***Strenke v. Hogner***, 2005 WI 25, ¶38, 279 Wis. 2d 52, 694 N.W.2d 296) (emphasis added). Whether the evidence will support an award of punitive damages is a question of law that we decide independently of the trial court.[9] ***Jacque v. Steenberg Homes, Inc.***, 209 Wis. 2d 605, 614, 563 N.W.2d 154 (1997).

¶14 The circuit court found it was "at best callous and at worst utterly reckless" for Midwest to intrude on Betzner's land without first attempting to determine the boundary. This failure was especially significant because Midwest's officers were "professional, experienced individuals" who "dabble in multi-million dollar transactions and should be well aware of their

[9] Midwest cites an unpublished case in support of this proposition.

responsibilities." Indeed, as noted previously, Naomi Isaacson is an attorney. Additionally, when conducting work on the opposite side of its property a year earlier, Midwest did have that boundary surveyed. The court also faulted Midwest for not removing the fill following Nordin's survey. Because Midwest's representatives were new to the area, the court concluded they could not have formed a strong belief that they had a valid claim for adverse possession.

¶15 The trial court also focused on Kalmar Gronvall's conduct, stating "his tactics appear to be the stuff of a B[-]rated movie" and that "[c]ontroversies of this kind are to be settled in the courts and not on the street." The court noted Gronvall was vocal at a judicial view of the property and was observed digging holes near the area in dispute.[10] In the latter instance, an officer responded and observed Gronvall burying a metal rod. Subsequently, Nordin returned to verify the location of the survey rods with a GPS device and discovered one of the rods had been removed. Gronvall was also involved in another incident. When Betzner, his attorney, and Nordin met in the field, Gronvall watched them with binoculars and then blocked them in and approached them at a nearby wayside. Further, during the pendency of this action, Kalmar Gronvall's son and Elizabeth Nett, a Midwest employee, entered Betzner's land from Midwest's property and began cutting grass and hay. Both individuals were cited for and convicted of trespassing.

¶16 Midwest argues it should not be punished for the conduct of others and asserts there was no evidence that Gronvall acted on Midwest's behalf. The

[10] The trial court also noted Gronvall was photographing Betzner's counsel's car during a court proceeding. We agree with Midwest that we may not rely on this evidence because the trial court concluded it was hearsay.

trial court, however, concluded "the only logical inference is that he is the alter ego of the defendant…." Gronvall was a prior Midwest board member. He also told Nordin's survey crew to leave the disputed boundary area because they were trespassing. Given the extent of Gronvall's involvement, his prior status as a board member, Nett's status as an employee, and the fact they approached the disputed land area from Midwest's property, the trial court could reasonably infer they acted on Midwest's behalf.

¶17 We conclude the evidence of trespass, continuing trespass, and harassing behavior more than amply supports an award for punitive damages. Punitive damages are especially appropriate in cases of trespass to land. ***Jacque***, 209 Wis. 2d 605. "Society has an interest in punishing and deterring intentional trespassers beyond that of protecting the interests of the individual landowner. Society has an interest in preserving the integrity of the legal system. Private landowners should feel confident that wrongdoers who trespass upon their land will be appropriately punished." ***Id.*** at 620. The court further recognized:

> The fact that the actor knows that his [or her] entry is without the consent of the possessor and without any other privilege to do so, while not necessary to make him [or her] liable, may affect the amount of damages recoverable against him [or her], by showing such a complete disregard of the possessor's legally protected interest in the exclusive possession of his [or her] land as to justify the imposition of punitive in addition to nominal damages for even a harmless trespass, or in addition to compensatory damages for one which is harmful.

Id. at 621-22 (quoting RESTATEMENT (SECOND) OF TORTS § 163 cmt. e (1979)).

¶18 Finally, we address Midwest's claim that the record does not support the trial court's compensatory damages award. The determination of damages is within the trial court's discretion and will not be upset unless clearly erroneous.

Three & One Co. v. Geilfuss, 178 Wis. 2d 400, 410, 504 N.W.2d 393 (Ct. App. 1993). The trial court allowed damages for the restoration of the disturbed land. In doing so, the court rejected Betzner's witness's proposed cost. Betzner presented a work estimate from Jeff Nolan, which was based on a land area of 32,000 square feet. The survey map, however, showed the disturbed area comprised only 11,900 square feet. The court therefore used Nolan's per-unit cost estimates for fill removal and topsoil replacement, but recalculated the total cost using the smaller land area figure.

¶19 Midwest asserts the trial court should have reduced the final compensatory damages award by an additional forty percent because Betzner testified the fill was only placed on forty percent of the area designated on the survey map. Betzner testified there was fill "on the northern part" of the cross-hatched area shown on the survey map, as well as some at the other end, but "not that much." When Betzner pointed out the area containing fill on the map, Midwest suggested it was about one-third. Betzner replied it was about forty percent. However, Betzner also testified the entire cross-hatched area had been stripped of its soil.

¶20 We conclude the record does not support the trial court's $7,988 award for fill removal because that amount was erroneously determined based on the entire cross-hatched area on the survey map.[11] However, the $4,775 award for topsoil restoration of the entire area is supported by the record. We therefore

[11] We also observe Betzner failed to respond to Midwest's "forty percent" argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

reverse in part the judgment for compensatory damages and remand for the trial court to redetermine the award for fill removal.

¶21 We cannot ignore Midwest's carelessness and rule violations. We sanction Midwest's appellate counsel for its misrepresentations of the record, *see* fns. 5 and 7, and citation of an unpublished case, *see* fn. 9. *See* WIS. STAT. RULES 809.19(1)(d)-(1)(e), 809.23(3), and 809.83(2). Counsel shall pay $200 to the clerk of this court within thirty days of the date of this decision.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Attorney sanctioned.

This case will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.