S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PETER DIVITO and EMMA DIVITO, Plaintiffs-Appellants,	UNPUBLISHED July 18, 2017
v JOAN POST, Defendant-Appellee.	No. 333855 Sanilac Circuit Court LC No. 14-035688-CH

Before: SERVITTO, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In this suit involving lakefront property owners, on June 24, 2016, following a bench trial, the trial court entered a no cause of action judgment against plaintiffs and dismissed their negligence and trespass claims against defendant. Plaintiffs appeal by right. For the reasons set forth in this opinion, we affirm in part, reverse in part, and remand for entry of an award of nominal damages in favor of plaintiffs.

I. BACKGROUND

Plaintiffs and defendant Joan Post own lake-front property on Lake Huron in Sanilac County. The properties are separated by a ravine that runs west to east. Defendant's property is on the south side of the ravine. Plaintiffs' property is on the north side of the ravine. The ravine has water flow from the culvert under M25 that drains down into Lake Huron. At times the creek bed of the ravine is dry. The parties use their properties primarily during the summer. Plaintiffs purchased their property approximately 30 years ago. Defendant purchased her parcel in 1992. At the time defendant purchased her property in 1992, there was a partial retaining wall on her property, which was used for erosion control.

In 2009, defendant hired Mike Pierson, owner of Pierson Piling LLC, to construct a 55-foot steel retaining wall on the north side of her property that abutted the ravine and ran close to her garage. Defendant was concerned about the embankment on that part of the property and wanted to install a wall to prevent more erosion on the embankment. The wall was to join with the old wall that had already been in place. Pierson was familiar with the property and the ravine and he previously did work for plaintiffs on their concrete seawall. Pierson contracted to construct defendant's wall and obtain all of the necessary permits. Pierson submitted a proposal to the Michigan Department of Environmental Quality (MDEQ). In September 2009, Theresa O'Brien (f/k/a Theresa Custodio), an environmental quality analyst, inspected the property and

ultimately issued a permit for the project. The MDEQ approved a 55-foot long by 6-1/2 foot high steel "break wall" and required that 16 cubic yards of toe-stone be installed with three "checkdams" for erosion control. The checkdams essentially consisted of field stone placed at the bottom of the ravine for the purposes of slowing the water flow.

Before beginning construction on the wall, Pierson obtained a survey and marked defendant's property off with string so that he would not trespass onto plaintiffs' property. In early October 2009, Pierson began construction on the wall. Pierson, who had constructed nearly 300-miles of seawall in his career, testified that he moved a 312 Caterpiller excavator into the ravine to complete the work. Pierson explained that he had previously used excavation equipment in the ravine and he maintained that he did not drive onto plaintiffs' property with the excavator. The new wall consisted of heavy-gauge steel and Pierson ensued that there was toe-stone at the base of the wall to prevent erosion underneath the wall. Pierson also constructed checkdams as required by the MDEQ permit.

After the wall was completed, plaintiff Peter Divito, Sr, complained to Joe Allen of Sanilac County that defendant damaged plaintiffs' side of the ravine. Allen oversaw Sanilac County's soil erosion/sediment control permit process and he had approved defendant's application; following the complaint, Allen revisited the property. Allen inspected the property, but did not find any violations. Nevertheless, because of the potential for future erosion, Allen requested that Pierson place riprap on the north side of the ravine. However, the MDEQ informed Allen that Pierson could not work on the north side of the ravine under the permit he obtained for defendant's project. In other words, plaintiffs were required to submit a new permit application before any erosion control mechanisms on the north side could be installed. Nevertheless, Pierson dumped some field stone into plaintiffs' side of the ravine as a form of erosion control.

In addition, after the wall was completed, Brian Rudolph of the MDEQ did a site inspection and found that activities at the site "exceeded the permitted activities" in that "dredging and filling" had occurred. A violation file was opened and O'Brien was in charge of ensuring resolution of the violation. O'Brien sent defendant a violation notice on December 22, 2009. Defendant responded, indicating that she notified Pierson of the violation and he took remedial measures.

On February 26, 2010, O'Brien sent another letter to defendant, indicating that the MDEQ was satisfied with the restoration work, but noted that additional silt fences were needed "on the north side of the stream prior to the spring thaw." O'Brien returned to the property in August 2010, after plaintiffs called and complained of erosion problems. O'Brien observed that silt fencing had been properly installed, but she noted small pockets of erosion that were present. O'Brien testified that by August 2010, Pierson had achieved compliance and the violation file was closed. O'Brien essentially testified that Pierson did some things incorrectly during the project, but by August 2010, he ultimately corrected the mistakes. Allen signed off on the project as well and indicated that Pierson did a "nice job" on the project.

On June 16, 2014, plaintiffs commenced this suit in the trial court. Plaintiffs alleged that defendant negligently installed the wall, which altered the flow of the creek and caused erosion and "partial collapse" of plaintiffs' property adjacent to the ravine. Plaintiffs also alleged that

part of defendant's wall encroached onto plaintiffs' property, which resulted in a trespass onto plaintiffs' property. Specifically, plaintiffs attached a 2012 survey to the complaint showing that the top of a 16-foot section of the wall leaned into plaintiffs' property, protruding from 3-inches to approximately 1.3-feet on plaintiffs' property. Plaintiffs requested damages and a permanent injunction requiring defendant to remove the wall to remedy the encroachment.

The trial court held a two-day bench trial in May 2016. At the trial, plaintiff Peter Divito, Sr. testified that before defendant installed the seawall, he never had a problem with erosion. Divito, Sr. explained that Pierson brought in heavy equipment to do the work and the equipment was on plaintiffs' property and damaged the property and caused erosion. Divito, Sr, testified that Pierson informed him that he would make plaintiffs' property better. Divito, Sr. testified that, after Pierson built the new wall, there was erosion problems on his property that caused three birch trees to "slide" into the ravine. In December 2009, Divito, Sr. noticed that his property adjacent to the ravine was starting to collapse. He called O'Brien and Allen and complained about the problem. Pierson eventually dumped some rock on plaintiffs' side of the ravine to try and remedy the erosion problems. Divito, Sr. testified that defendant should have to fix his erosion problems by installing a retaining wall because the installation of defendant's new seawall caused plaintiffs' erosion. Divito, Sr. also stated that the new wall "leaned" 22-inches onto his property.

Peter Divito, Jr. testified that his parents own the cottage directly adjacent to defendant's property. The properties are separated by a ravine. In October 2009, Divito, Jr. was hunting with his dad at the cottage and they noticed that Pierson was working with excavation equipment in the ravine. The ravine floor looked "pretty tore up," and plaintiffs' vegetation was "torn up." Divito, Jr. returned to the property in April 2009, and noticed that a large portion of the embankment collapsed and plaintiffs lost one or two trees near the edge of the ravine. The erosion looked like "a lot more," than normal and it occurred all along the embankment. However, Divito, Jr. also testified that the collapse occurred "over the years," and plaintiffs had lost five feet of property over the years.

Pierson testified that in his career he had completed "thousands" of projects similar to defendant's seawall that required MDEQ permits. He estimated that he installed over 300 miles of retainer wall in his career. Pierson testified that there is nothing that he did that could have caused increased erosion on the north side (plaintiffs' side) of the ravine. Pierson also explained that he had a survey completed and marked defendant's property lines with string before he began working on the wall to ensure that he did not trespass. Pierson testified that the footings of the wall were installed on defendant's property, but he agreed that, over time, the top of the wall could "lean" and a portion of it could lean onto plaintiff's property.

Pierson testified that in 1999 he did work for plaintiffs and capped off plaintiffs' concrete seawall. Pierson explained that plaintiffs had problems with erosion in 1999 and he advised plaintiffs not to throw branches and other materials into the ravine. He advised plaintiff Divito, Sr. to clean up the embankment and get grass to grow.

Pierson explained that he went to defendant's property in spring 2016, and observed three-feet of water in the ravine, which was common. Pierson went upstream and took photographs of a substantial amount of rushing water. The photographs were admitted as

evidence. Pierson explained that the wall did not cause increased water-flow on plaintiffs' side of the ravine. Instead, Pierson explained that farmers in the area were "tiling," which, in turn, caused increased water-flow in the watershed. The increase in tiling caused the water flow to come "twice as fast" into the ravine. Furthermore, Pierson explained that he removed a portion of defendant's old retainer wall that diverted water runoff onto plaintiffs' property. Pierson denied that he violated the MDEQ permit when he built the wall, but agreed that immediately after he completed the wall, O'Brien wanted him to relocate some stones for the step dams. When plaintiffs complained to him about erosion, Pierson placed some riprap on the north side of the ravine. However, Pierson later informed Allen that he could not work on the north side of the ravine without a new MDEQ permit. Pierson testified that he worked with the MDEQ and Sanilac County every step of the process and did nothing wrong.

Allen testified that he was involved with defendant's permit application. He visited defendant's property four times for inspections, twice for complaints, and six times for random site checks. Plaintiffs complained to Allen that defendant damaged their side of the ravine. Allen inspected the property, but did not find any violations. Allen did however request that Pierson install some riprap on the north side of the ravine. Allen stated that the riprap was necessary because of the natural flow of water. Allen testified that nothing about defendant's project contributed to erosion on plaintiffs' side of the ravine. Instead, what was happening on plaintiffs' property was caused by natural runoff. Allen noted that, at some point, plaintiffs had installed a jetty, which indicated that the erosion problems were not new. Allen recommended that plaintiffs install riprap, but plaintiffs did not take any affirmative steps to control erosion. Allen signed-off on the project in June 2010 and noted that Pierson did a "nice job" on the work.

As previously noted, O'Brien testified at trial that she handled the permitting process for defendant's seawall. Pierson obtained the permit for the wall and it was approved. Pierson eventually completed the project in compliance with the permit, although there were some things that Pierson needed to correct after he completed the work. Specifically, O'Brien requested that Pierson install silt fences and check dams. Ultimately, Pierson completed the requests and O'Brien closed the violation file and confirmed that the project was completed in compliance with the MDEQ permit.

Following the close of proofs, the trial court made findings of fact on the record. The trial court found that defendant contacted Pierson to build the retainer wall because she was concerned with erosion. The trial court also found that Pierson was a competent contractor who obtained and complied with all of the necessary permits. According to the trial court, Pierson ensured that the wall was built on defendant's property. As to the issue of protrusion onto plaintiffs' property, the trial court found that Pierson's testimony showed that the base of the wall was constructed on defendant's property and, although the top of the wall could have "leaned" onto plaintiffs' property, there was no evidence to show that plaintiffs suffered damages. Furthermore, the trial court found that the wall was previously adjusted and, while future adjustments may be necessary, there was no evidence to support an order to remove the wall.

With respect to the erosion on plaintiffs' property, the trial court reasoned that there was no evidence that the wall caused any erosion. The trial court noted that O'Brien oversaw the permitting process and ensured environmental compliance. Pierson obtained and complied with

the necessary permits and none of the witnesses testified that the wall caused plaintiffs' erosion or had any impact on the erosion. Instead, spring rain following the construction was the cause of the erosion and the rains have continued to cause erosion problems. The trial court found that plaintiffs' erosion issues were caused naturally and plaintiffs took no remedial measures to stop the erosion. The court found no cause of action with respect to both plaintiffs' negligence and encroachment/trespass claims. On June 14, 2016 the court entered a written judgment in favor of defendant and dismissed both plaintiffs' claims with prejudice. This appeal then ensued.

II. STANDARD OF REVIEW

We review a trial court's findings of fact at a bench trial for clear error. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Yono v Carlson*, 283 Mich App 567, 569; 770 NW2d 400 (2009) (quotation marks and citation omitted). A trial court's conclusions of law following a bench trial are reviewed de novo. *Walters*, 239 Mich App at 456.

III. ANALYSIS

i. NEGLIGENCE

In their complaint, plaintiffs did not label their claims; however, plaintiffs alleged that defendant's installation of the break wall caused damages to plaintiffs' property. Plaintiffs alleged defendant failed to install the wall "in accordance with commercially acceptable standards and practices, and failed to comply fully with the specifications and representations as presented in the permit application. . . ." These allegations sounded in negligence. See *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007) ("[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim.")

To establish a cause of action for negligence, a plaintiff must prove the following four elements by a preponderance of the evidence: (1) that defendant owed a legal duty to plaintiff, (2) that defendant breached her duty, (3) that plaintiff suffered damages, and (4) that defendant's breach was the actual cause and proximate cause of plaintiff's damages. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). Plaintiffs did not prove any of these elements at trial.

Here, plaintiffs presented no evidence to show that defendant owed plaintiffs a duty in constructing a retaining wall on her property or that defendant breached any duty. Specifically, plaintiffs did not introduce any evidence regarding Pierson's duty in constructing the wall. Plaintiffs did not present an expert witness on acceptable commercial standards and practices or that Pierson violated proper professional standards and practices. There was evidence that Pierson was required to comply with the MDEQ permit in constructing the wall. However, the evidence showed that Pierson did construct the wall in accord with the requirements in the MDEQ permit process. O'Brien oversaw the permit process and she testified that Pierson complied with the permit. Although Pierson made a few mistakes at the outset, O'Brien identified the mistakes and Pierson corrected the mistakes. O'Brien testified that by August

2010, the project was in compliance with the MDEQ permit and she closed the violation file. In addition, Allen testified that, after plaintiffs complained, he inspected defendant's property. Allen did not find any violations. While he recommended that remedial actions be taken on the north side of the ravine, Allen testified that his recommendation was not based on anything that Pierson did in constructing the wall. Instead, Allen explained that plaintiffs needed to take remedial actions on their side of the ravine because of the natural flow of the water and the natural erosion that would occur over time. Allen ultimately signed off on the project and he noted that Pierson did a "nice job," with the construction. There was no evidence that defendant breached any duty owed to plaintiffs.

Moreover, there was no evidence that defendant caused plaintiffs to suffer damages. While Divito, Sr. testified that the wall caused erosion on his property, there was no evidence to support that bald assertion. O'Brien testified that Pierson complied with the MDEQ permit. She did not identify anything about the wall or the construction process that caused erosion on plaintiffs' property. Pierson testified that he had completed thousands of similar projects and had installed hundreds of miles of retainer wall throughout his career. Pierson explained how he had a survey completed and how he installed the wall. Pierson explained that there was nothing about the wall that would cause erosion on plaintiffs' property. Rather, Pierson explained that plaintiffs previously had erosion problems and that the erosion was naturally caused by the watershed. In addition, Allen testified that there was nothing about defendant's wall that caused plaintiffs' erosion issues. Allen explained that there was naturally-occurring erosion on plaintiffs' property and plaintiffs did not take any affirmative steps to address the erosion problems. In short, there was no evidence to support any of the elements of a negligence claim and the trial court did not clearly err in finding no-cause of action on the claim.

ii. TRESPASS

Plaintiffs' labeled their second count "encroachment," and alleged that defendant "constructed the steel wall on property owned by the Plaintiffs and without the permission of the Plaintiffs." In support of their claim, plaintiffs introduced a 2012 survey purporting to show that a portion of defendant's wall "leaned" or intruded onto plaintiffs' property. Plaintiffs requested that the trial court issue an injunction requiring defendant to remove the wall.

The trial court found no cause of action on plaintiffs' trespass claim, finding as follows:

> The 2012 survey attached to the plaintiff's complaint indicates that the wall was allegedly tilted north over a three year period and in fact it's even tilted more since then. I mean it's kind of a continuum type of situation that often times happens when you put in a tall sea wall against a bank and as time goes along it's gonna tend to lean a little bit in. This Court find that this alleged tilting was not intentional or willful on the defendant's behalf. According to the complaint by the plaintiffs and the exhibit that got used during the course of examining the witnesses, the survey [] used by the parties here but it kind of lays out and shows the area that the plaintiffs were concerned about in relationship to what they had termed in their complaint as trespass. [] [T]hey allege that three inches to 1.3 feet along a 16 foot section of the sea wall according to their survey that was taken at

> the top of the sea wall, not at the bottom, encroached to that extent onto their property.
>
> [] [I]t's very much like if you had a tree on one piece of property and a fence in between the neighbor's property and the neighbor is not happy . . . but the base of the tree is on your property, there's not much he can do about it. [] But I think what's relevant here is . . . is that all the evidence would indicate, that I heard, that the sea wall was put in by Mr. Pierson on the defendant's property along the bank in such a fashion that the footing that went down into the ground, the base of that sea wall was on the defendant's property, that in time if the top way up bent over a little bit into the air space, that it could be concluded as being the property of the defendant's [sic], that could be the only intrusion that I'm aware of. And I certainly haven't seen any evidence or testimony during the course of this trial to suggest that there would be any justification for this Court to order the removal of that sea wall . . . Nor do I find that the fact that it's drifted a little bit and it's been adjusted before and it might have to be adjusted again, that in any form or fashion, I've heard no evidence that would suggest to this Court that that in any way has intruded upon or damaged any rights of the plaintiffs in this case.

A trespass is an unauthorized invasion upon the private property of another. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195, 540 NW2d 297 (1995). Here, the 2012 survey clearly showed that the wall slightly protruded onto plaintiffs' property. Defendant's witness, Pierson, testified that he used a survey during construction of the wall to ensure that he installed the footings on defendant's property and he maintained that the footings were on defendant's property. However, Pierson testified that the top of the wall could lean after time. Pierson's testimony essentially conceded that the top of the wall was leaning onto plaintiffs' property. The trial court clearly erred in finding no trespass occurred. The court found no trespass based on its determination that Pierson did not intentionally cause the wall to intrude. However, a trespass does not require intent; rather,

> 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. *Once such an intrusion is proved, the tort has been established*, and the plaintiff is presumptively entitled to at least nominal damages. [*Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999) (emphasis added).]

Here, because there was no evidence to refute plaintiffs' 2012 survey showing that a trespass occurred, the trial court clearly erred in finding no cause of action on the trespass claim. However, finding a trespass does not necessitate that the trial court order defendant to remove the wall. In some instances involving trespass, injunctive relief may be appropriate. *Kratz v Independent Order of Oddfellows*, 442 Mich 136, 149; 500 NW2d 115 (1993). "In such cases the approach is to balance several factors—the relative hardship to the parties and the equities between them—and to grant or deny the injunction as the balance may seem to indicate." *Id.* (quotation marks and citations omitted). Here, the trial court indicated that there were no facts to support the requested injunctive relief—i.e. an order requiring defendant to remove the wall. The trial court did not err in so holding. Here, ordering the removal of the retaining wall would

have been a drastic option, which would possibly result in significant erosion of defendant's property coupled with the potential damage to her garage. Injunctive relief would have resulted in a significant hardship to defendant. In contrast, the wall's minor intrusion onto plaintiffs' land presented them with no hardship at all. As discussed above, there was no evidence to support that the wall was the cause of any of plaintiffs' erosion problems. The wall merely leaned onto a portion of plaintiffs' property at most 15-inches and there was no evidence to support that Pierson built the wall on plaintiffs' property. In short, requiring defendant to remove the wall would have been "disproportionate to the hardship to the plaintiff in allowing the encroachment to remain," and therefore the trial court did not err in declining to award injunctive relief. *Kratze*, 442 Mich at 144.

Apart from injunctive relief, a plaintiff may recover other actual damages upon proving a permanent trespass such as the one in this case. In these instances, "the correct measure of damages is the diminution in value of the property itself as represented by the value of the property without the encroachment, minus the value of the property with the encroachment." *Id.* at 150. In this case, however, there was no evidence that there was any diminution in value of plaintiffs' property. As discussed above, there was no evidence that the wall caused any erosion on plaintiffs' property. Moreover, Pierson testified that when he built the new wall, he removed a portion of defendant's old wall that diverted water onto plaintiffs' property. This testimony supported that the wall did not cause actual damages and the trial court did not clearly err in finding that plaintiffs did not suffer actual damages.

Finally, in instances of trespass where injunctive relief and actual damages are not warranted, a plaintiff nevertheless is entitled to nominal damages. "Because a trespass violate[s] a landholder's right to exclude others from the premises, the landholder could recover at least nominal damages even in the absence of proof of any other injury." *Wiggins v City of Burton*, 291 Mich App 532, 555; 805 NW2d 517 (2011) (quotation omitted). "Nominal damages are those damages recoverable where [a] plaintiff's rights have been violated by breach of contract or tortious injury, but no actual damages have been sustained or none can be proved." *4041–49 W Maple Condo Ass'n v Countrywide Home Loans, Inc*, 282 Mich App 452, 460; 768 NW2d 88 (2009).

Here, the evidence showed that defendant's wall encroached onto plaintiffs' property. Although plaintiffs were not entitled to the injunctive relief they requested, and although there was no evidence of actual damages, because there was a trespass, plaintiffs were entitled to at least nominal damages, however minor those damages may be.[1] *Wiggins*, 291 Mich App at 555.

[1] See e.g. *Gray Farms LLC v Duane L Sherman Trust*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 2017 (Docket Nos. 330549/331604) (affirming trial court award of $100 in nominal damages for trespass).

Affirmed in part, reversed in part, and remanded for entry of an award of nominal damages in favor of plaintiffs. Neither party having prevailed in full, no costs are awarded. MCR 7.219(A). We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Stephen L. Borrello