COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0354

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

DELORES M. JOHNSON,

PLAINTIFF-RESPONDENT,

V.

THOMAS A. GULSETH AND MARILYN A. GULSETH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Thomas and Marilyn Gulseth appeal from a judgment awarding compensatory and punitive damages to Delores Johnson after a jury found that the Gulseths trespassed on her property and damaged it. We affirm.

¶2 Johnson and the Gulseths own adjoining property and have a boundary dispute. Johnson purchased her property in 1976; the Gulseths purchased the adjoining property in 1987. In August 1998, believing that Johnson's metal fence encroached on their property, the Gulseths erected a wooden fence, removing part of Johnson's metal fence in the process. Johnson then sued for trespass, adverse possession and reformation of her deed to reflect that the property previously enclosed by the metal fence belonged to her. At the close of the evidence, the court reformed Johnson's deed and submitted the rest of Johnson's claims to the jury. The jury found for Johnson on trespass and awarded $19,000 in compensatory and $20,000 in punitive damages. The Gulseths appeal, challenging the court's reformation of Johnson's deed, the damages awards and an evidentiary ruling admitting two ancient documents at trial. The Gulseths do not challenge the jury's trespass finding.[1]

¶3 We address the reformation challenge first. After the close of evidence at trial, the circuit court made the following findings of fact relating to the boundary between the Johnson and Gulseth properties. The Johnson property was originally created in October 1956 when a part of Lot 5 was carved out by its then-owner, Carl Hermann, based upon a survey performed by J. Alex Stemper. The carved-out parcel (hereinafter "the Johnson property") was intended to have dimensions of 107 feet east to west by 75.68 feet north to south. The court found that the Stemper survey contains an inconsistency between the drawing and the legal description. While the drawing shows that the eastern boundary line of the Johnson property runs South 5° 44' East 75.68 feet from the point of beginning,

[1] The conclusion to the Gulseths' appellate brief makes a one-sentence challenge to the trespass finding. Because this claim is insufficiently briefed, we decline to address it. *See* ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990).

the legal description set forth beneath the drawing states that the eastern boundary line runs South 5° 44' West 75.68 feet. The court found that the dimensions in the drawing could only be achieved if the eastern boundary line ran South 5º 44' East 75.68 feet, rather than South 5° 44' West 75.68 feet as stated in the description. The court deemed the drawing correct and found that a scrivener's error occurred in the legal description.

¶4 The court further found that after the division of Lot 5, Hermann conveyed all of Lot 5, except the Johnson property, to the Bocks, the Gulseths' predecessor in title. The Hermann-Bock deed describes the Johnson property as an exception to the conveyance to the Bocks. The description of the excepted Johnson property contains the scrivener's error. The deeds of the predecessors in title to Johnson and the Gulseths and the deeds held by Johnson and the Gulseths themselves also contain the scrivener's error.

¶5 The court found that the metal fence predated Johnson's purchase of the property and ran substantially along the correct eastern boundary line of Johnson's parcel, i.e., South 5º 44' East 75.68 feet (per the Stemper drawing). The court found that when Johnson purchased her property, the parties to that transaction intended that the eastern boundary of the property would be established by the metal fence and mistakenly believed that the deed's legal description corresponded with the Johnson property's actual boundaries.

¶6 Based upon these findings, the circuit court reformed Johnson's deed to reflect the correct bearing of South 5º 44' East 75.68 feet for the property's eastern boundary, i.e., the common boundary with the Gulseths.

¶7 The Gulseths argue that the circuit court erred in reforming Johnson's deed. This argument is intertwined with the Gulseths' contention that

the reformation ruling erroneously relied upon two documents offered by Johnson and admitted into evidence under the "ancient documents" exception to the hearsay rule. *See* WIS. STAT. §§ 908.03(16) and 909.015(8) (1997-98).[2] We address the evidentiary ruling first.

¶8 The first document is the Stemper survey. Johnson testified that she received the Stemper survey from Everett Morrow in 1977 or 1978. Morrow was a neighboring real estate broker who was involved in the purchase of the property by Johnson's predecessors in title, the Feldmanns.

¶9 The second document is a 1974 written statement bearing a signature of Eugene Feldmann, whose widow was Johnson's immediate predecessor in title. The statement refers to a 1974 offer to purchase the Johnson property and states that the lot size and description in the offer to purchase should be corrected pursuant to the Stemper survey. Johnson obtained the Feldmann statement at the same time and from the same source as she received the Stemper survey.

¶10 "Statements in a document in existence 20 years or more whose authenticity is established" are not excluded by the hearsay rule. WIS. STAT. § 908.03(16). Authentication requires that the document "(a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence 20 years or more at the time it is offered." WIS. STAT. § 909.015(8).[3] The circuit court admitted both

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[3] WISCONSIN STAT. § 909.015(8) has been amended; however, the changes to this section do not affect the outcome of this case.

documents because they were at least twenty years old, were in a condition which suggested their authenticity, and were in a place that they would likely be.

¶11 The admission of evidence is within the circuit court's discretion, and its ruling will not be overturned on appeal unless the court misused its discretion. *See* ***Gonzalez v. City of Franklin***, 137 Wis. 2d 109, 139, 403 N.W.2d 747 (1987). On appeal, the Gulseths concede that the documents appear to have been in existence at least twenty years. However, they argue that neither document was found in a place where it would likely be. The circuit court found otherwise, and this finding is not clearly erroneous. *See* WIS. STAT. § 805.17(2). The Stemper survey was in the possession of a neighboring real estate broker who was involved in a transaction involving Johnson's predecessors in title. This is a place where the document would likely be. The Feldmann statement came from the same source, again a place where the document would likely be. Because the documents at issue were found in logical repositories and met the other criteria for ancient documents, the circuit court did not misuse its discretion in admitting them into evidence.

¶12 Having upheld the admission into evidence of the Stemper survey and the Feldmann statement, we turn to the Gulseths' claim that the court relied upon these documents to the exclusion of other evidence to reform Johnson's deed. The record does not bear this out. The court also relied upon the testimony of William Karpen, a surveyor who testified as an expert for Johnson. Karpen testified that he surveyed Johnson's property in 1994 at the request of a financial institution. The property description provided to him contained the scrivener's error which originated in the Stemper survey. When Karpen started working with the legal description, he realized that it must contain an error because the description did not close mathematically, i.e., he was not able to start at the point

of beginning and follow the description around back to the point of beginning. Karpen noticed that the scrivener's "west for east" error reduced the size of Johnson's property by fifteen feet. Karpen's field measurements supported his conclusion that the description contained a typographical error. Karpen surveyed the property based upon the dimensions set forth in the legal description (107 feet east and west and 75.68 feet north and south) and prepared a survey which indicated a bearing of "east" instead of "west" for the eastern boundary description. The metal fence ran along the boundary Karpen calculated from the field measurements. Karpen further testified that a survey conducted by Schuster Surveying in 1997 for the Gulseths offers a legal description which is based upon the scrivener's error.

¶13 It is clear that the court relied upon evidence in addition to the ancient documents in deciding to reform Johnson's deed. The court's findings on reformation are not contrary to the great weight and clear preponderance of the evidence. *See* ***First Nat'l Bank v. Scalzo***, 70 Wis. 2d 691, 700, 235 N.W.2d 472 (1975) (quantum of evidence needed to establish reformation).

¶14 The Gulseths argue that there was no mutual mistake between the parties to this suit and therefore the court should not have reformed the deed. We disagree. While it is true that "[t]o reform a deed on the grounds of mistake the mistake must be mutual between or common to all the parties to the instrument," ***Breeden v. Breeden***, 6 Wis. 2d 149, 152, 93 N.W.2d 854 (1959), the scrivener's error in this case was common to both parties' deeds. We think this circumstance warranted reformation.

¶15 The Gulseths argue that their evidence was more compelling than Johnson's on the reformation question. However, weighing this evidence was for

the circuit court proceeding in equity. *Cf.* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 410, 308 N.W.2d 887 (Ct. App. 1981); *see also* ***First Nat'l Bank***, 70 Wis. 2d at 700 (reformation is an action in equity).

¶16 Having upheld the circuit court's reformation ruling, we turn to the Gulseths' claim that advising the jury that the deed had been reformed inappropriately influenced the jury's determination regarding the trespass claim. We disagree. The jury was required to decide trespass, and an element of trespass is ownership of the property. *See* ***Mohr v. City of Milwaukee***, 101 Wis. 2d 670, 677, 305 N.W.2d 174 (Ct. App. 1981), *rev'd on other grounds*, 106 Wis. 2d 80, 315 N.W.2d 504 (1982) ("[T]respass can only be committed by a stranger to the title."). A "trespasser" is defined as "[o]ne who goes upon premises owned, occupied, or possessed by another, without (consent) (invitation), express or implied, extended by the owner, occupant, or possessor …." WIS JI—CIVIL 8012. To withhold from the jury information regarding ownership of the property would have forced the jury to operate in a vacuum and could have led to a verdict which was inconsistent with the court's decision on reformation.

¶17 The Gulseths argue that the $19,000 compensatory damages award is unsupported by the evidence. The circuit court declined to set aside this damages award. We afford special deference to a jury determination when the circuit court has approved the finding of the jury. *See* ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). We determine whether the award was within reasonable limits. *See* ***Mikaelian v. Woyak***, 121 Wis. 2d 581, 592, 360 N.W.2d 706 (Ct. App. 1984). A damages award is excessive if it reflects a rate of compensation beyond all reason. *See* ***Peissig v. Wisconsin Gas Co.***, 155 Wis. 2d 686, 703, 456 N.W.2d 348 (1990). We search for credible

evidence that will sustain the verdict. *See* ***Coryell v. Conn***, 88 Wis. 2d 310, 317-18, 276 N.W.2d 723 (1979).

¶18 Johnson testified that she was deprived of the use of her property for the fourteen-month period after the Gulseths erected their wooden fence. The property incorporated by the Gulseths' fence contained bushes and flowers and stored grass clippings. Johnson testified that the area was becoming overgrown and that it would take much work to restore it to its previous condition. Johnson also testified that her metal fence and yard were damaged by the installation of the Gulseths' fence. The Gulseths rolled up eight to ten feet of Johnson's fence and placed it next to a tree. The jury was instructed that a damages award to Johnson should fairly compensate her for the Gulseths' trespass.

¶19 The purpose of damages in trespass is to "more carefully guard against failure to compensate the injured party than against possible overcharge to the wrongdoer." ***Threlfall v. Town of Muscoda***, 190 Wis. 2d 121, 133, 527 N.W.2d 367 (Ct. App. 1994). The trespasser's modification of the property's condition may injure the property owner's convenience and comfort in the use of the property. *See* ***id.*** This ought to be substantially compensated, even if the injury does not impair the property's general market value. *See* ***id.*** Johnson's testimony met these objectives. The jury was entitled to find it credible and assign it weight. *See* ***Frayer v. Lovell***, 190 Wis. 2d 794, 810, 529 N.W.2d 236 (Ct. App. 1995).

¶20 The Gulseths claim that as a matter of law, the punitive damages question should not have been submitted to the jury because they had a good faith belief that the property belonged to them. The circuit court initially decides whether the evidence warrants submission of a punitive damages question to the jury. *See* ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 735, 456 N.W.2d 585

(1990). The court should not submit a punitive damages question to the jury unless there is evidence "warranting a conclusion to a reasonable certainty that the party against whom punitive damages may be awarded acted with the requisite outrageous conduct." ***Id.*** On appeal, we independently review the record to determine whether "as a matter of law the evidence justified submitting the issue to the jury." ***Id.*** at 736.

¶21 In a trespass case, punitive damages may be awarded if the defendant acted in willful or reckless disregard of the plaintiff's rights. *See* ***Gianoli v. Pfleiderer***, 209 Wis. 2d 509, 527, 563 N.W.2d 562 (Ct. App. 1997). The Gulseths argue that they had a good faith belief that the property belonged to them and that this belief bars punitive damages as a matter of law. While the Gulseths may have held that belief, Johnson testified that the Gulseths knew that she claimed the property and that the metal fence predated the Gulseths' purchase of their property. The Gulseths disregarded Johnson's claim and unilaterally asserted dominion over the disputed property by taking down part of Johnson's fence and erecting their own. Additionally, Thomas Gulseth testified that he would not concede that Johnson owned the disputed property, even if it were so adjudicated. The nature of the Gulseths' conduct was a jury question, and there was sufficient evidence from which a jury could determine that the Gulseths willfully disregarded Johnson's rights. The court did not err in submitting the punitive damages question to the jury.

¶22 The Gulseths dispute the $20,000 punitive damages award. The jury was instructed to award punitive damages if it found that the Gulseths acted in intentional disregard of Johnson's rights. The court's instructions defined intentional disregard as acting with a purpose to disregard Johnson's rights or acting with an awareness that the Gulseths' acts were practically certain to result

in Johnson's rights being disregarded. The jury was also instructed that the purpose of punitive damages is to punish a wrongdoer and to deter the wrongdoer and others from engaging in similar conduct in the future. The jury was further instructed to consider the grievousness of the Gulseths' conduct, the potential and actual damage of the conduct, and the Gulseths' ability to pay.

¶23 The record contains credible evidence to sustain the punitive damages award. *See* ***Coryell***, 88 Wis. 2d at 317-18. Johnson testified that it was not until May 1997 that the Gulseths, in a letter from their counsel, claimed that her metal fence was on their property. The letter demanded that Johnson remove the fence. Johnson replied that the fence preceded her ownership of the property and that the lot line was legally established along the fence line. Johnson stated that any attempt to remove the metal fence would be "met with appropriate legal action." Johnson testified that she did not hear anything further about the matter until early on the morning of August 29, 1998, when she awoke to find that the Gulseths had opened and rolled back her metal fence and were installing a wooden fence. The Gulseths entered her property without her permission. After the Gulseths' wooden fence was erected, Johnson could not gain access to property which had formerly been enclosed by her metal fence. Johnson testified that she was very upset, and that the disputed area was now overgrown and would be difficult to restore to its former condition.

¶24 Thomas Gulseth testified that he purchased the property in 1987 and that a survey at that time showed that Johnson's fence was on his property. Gulseth mentioned the encroaching fence to Johnson's husband five or six months later and stated that at some point the metal fence would have to be moved. Gulseth asked Johnson to move the fence a year later and a year after that. Gulseth obtained a permit to place a wooden fence on his property after the city

surveyed the property. Gulseth unlocked a section of Johnson's metal fence and rolled it up. He testified that with Johnson's fence in place, his lot was not large enough for a duplex and he would have to seek a variance. Gulseth claimed that the disputed property had not been maintained and was used for grass clippings. Gulseth testified that even if a court determined that he did not own the property as he claimed, he would still believe he owns it. He admitted that he had not closely read the legal description on his deed or the Schmitt survey completed at the time he purchased his property in 1987.

¶25 The jury was required to weigh the contradictory testimony of Johnson and Thomas Gulseth. There was credible evidence from which the jury could find that the Gulseths acted in disregard of Johnson's rights and unilaterally asserted dominion over Johnson's property.

¶26 The Gulseths complain that the $20,000 punitive damages award is excessive. We consider the following factors on the question of excessiveness. There is sufficient evidence of the degree of reprehensibility of the Gulseths' conduct to warrant a punitive damages award. *See* ***Gianoli***, 209 Wis. 2d at 529. There is also a reasonable relationship between the compensatory damages of $19,000 and the punitive damages of $20,000. *See* ***id.*** at 529-30. A comparison of the punitive damages award with the civil or criminal penalties which could have been imposed for the Gulseths' conduct also supports the punitive damages award. While entry onto another's land without consent is a Class B forfeiture which cannot exceed $1000, *see* WIS. STAT. §§ 943.13(1m) and 939.52(3)(b),[4] we do not

[4] We do not address whether the $1000 forfeiture is assessed as a single forfeiture amount for the ongoing trespass or whether each day of the trespass is subject to a $1000 forfeiture.

conclude that a punitive damages award twenty times larger is excessive. The punitive damages award is supported by the evidence and is not excessive.

¶27 Finally, the Gulseths argue that they do not have the ability to pay the punitive damages award, another factor in determining whether the award was excessive. *See* ***Gianoli***, 209 Wis. 2d at 532. However, Thomas Gulseth testified that he co-owns a forty-six acre subdivision. There was sufficient evidence that the Gulseths have the ability to pay the punitive damages award.

By the Court.—Judgment affirmed.

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