Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-295

JULY TERM, 2010

Randy Oakley and Jennifer Oakley	}	APPEALED FROM:
	}	
v.	}	Orange Superior Court
	}	
	}	
Victory in Jesus Ministries, Inc., & David Lund	}	DOCKET NO. 80-5-05 Oecv
	}	
		Trial Judge: Mary M. Teachout

In the above-entitled cause, the Clerk will enter:

Defendants appeal from the trial court's order declaring the location of a disputed boundary line and awarding Randy and Jennifer Oakley compensatory and punitive damages for trespass and conversion. We vacate the punitive damages award, but otherwise affirm the court's order.

The Oakleys and Victory in Jesus Ministries, Inc. (VIJ) own adjoining lots, and David Lund owns land directly across the road from VIJ. Lund is the superintendent of VIJ projects and a VIJ minister. Although Lund and the Oakleys initially got along, problems arose in 2004 when the Oakleys discovered that defendants had dug a large trench on their property. In May 2005, the Oakleys filed a complaint against defendants, seeking a declaration of the location of the common boundary line between their lot and the land owned by VIJ. They also sought compensatory damages for trespass and conversion of logs, as well as punitive damages.

Following a court trial and a site visit, the court granted judgment to the Oakleys. It found as follows. The Oakley lot was created in 1985 when a larger lot was subdivided. The Oakleys own the southerly portion of the original lot, and VIJ owns the northerly parcel. When the Oakley parcel was created, four iron pipes were placed in the ground at each corner marking the boundaries. The only disputed boundary is the northwest corner and the location of the common boundary line from the northwest corner to the undisputed northeast corner. The 1985 deed describes the Oakley parcel in relevant part as "[c]ommencing at an iron pipe located at the Southwesterly corner of the premises and proceeding North a distance of 400 feet, more or less, along the Fulton District School Road, to an iron pipe located at the Northwesterly corner of the premises." The court found that the pipe originally placed at the northwest corner was no longer in the ground as of 1990.

VIJ purchased its lot in May 1990. That same year, Lund purchased land directly across the road. Since 1990, VIJ made considerable changes to its property, including the creation of

ponds. VIJ also built up the area around the disputed northwest corner of the Oakley land and along the common boundary line by adding substantial amounts of fill and reshaping the land. The Oakleys purchased their lot in 2003.

In the summer of 2004, VIJ was doing some water management work, as approved by its members, because runoff water from uphill was washing out the back of a dam near the Oakley land. VIJ decided to create a water retention pond and divert the uphill water into the pond so as to avoid the dam. Lund's son-in-law, Andrew Lea (a member of VIJ) operated the construction equipment. As part of the project, Lea cut a trench several feet wide to direct water from uphill to the retention pond on VIJ land. Some of the trench was on the Oakleys' land. The court rejected defendants' claim that the trench was entirely on VIJ land, as well as its assertion that, to the extent that water flowed across Oakley land toward the trench, it was along the path of an old logging road. Instead, the court found that the water had been directed to flow through a deliberately dug trench and that the trench was clearly located in significant part (over 100 feet) on the Oakleys' property. At the time this work was done, the Oakleys had no knowledge of it and had not consented to it.

VIJ later did more work on its ponds and water system. VIJ had an excavator make a cut in the trench and directed water at a 90 degree angle downhill from the trench toward the road, roughly along the course of the VIJ-Oakley common boundary. The area was wooded, and while it was difficult to tell exactly where the water channel ran in relation to claimed boundary lines, at least a part of it was on the Oakley side, even according to defendants' survey. The water cut a channel up to three feet wide that resulted in soil erosion and caused many trees to fall in toward the channel, including trees on Oakleys' property. VIJ also installed a four inch pipe through the bank of one of its retention ponds. The pipe was located on VIJ land, but pointed directly toward the Oakley parcel and discharged water to join the channel that crossed into the Oakley property. As a result of these changes in the water flow, a new drainage stream flowed across Oakleys' lot. It started from the channel running downhill along the boundary, and angled toward the interior of the Oakley property to a point where it joined a natural stream on Oakleys' land.

Mr. Oakley discovered the trench in July 2004 and the boundary issue arose soon thereafter. The Oakleys had a survey prepared by Harold Marsh, a licensed surveyor, in the fall of 2004. Marsh located the northwest corner by relying on the 400 foot distance in the 1985 deed. Mr. Marsh died before trial, but another surveyor testified as an expert that, in the absence of finding the pipe in the ground as the northwest monument, Marsh properly relied on the 400 foot measurement to determine the northwest corner.

VIJ had its property surveyed in July 2006 by licensed surveyor Richard Bell. Bell relied on affidavits from the original grantor and grantee of the Oakley lot. The original grantee was the grantor's sister, who is married to the former president of VIJ. Bell marked the northwest corner where the VIJ members said it was, with the result that the Oakley property had 360 feet of road frontage, rather than 400. The Oakleys' expert testified that this large discrepancy was not acceptable as the first course along a straight road. Bell acknowledged that, without the information about a pipe as received from the VIJ members, it would have been proper to rely on the 400 foot measurement—but that he did not do so because of the affidavits purporting to locate the former pipe. The court found it highly unlikely, based on its site visit, photographs,

and other evidence, that the original iron pipe was located where VIJ said, and found it much more likely that it was located at a spot 400 feet north of the southwest corner. The court found that VIJ had not met its burden of showing that the original monument at the northwest corner was where the VIJ members told Mr. Bell it was located. Absent such proof, the court concluded the Marsh survey more accurately depicted the northwest corner and therefore properly identified the common boundary between the properties. Based on additional findings discussed in more detail below, the court also awarded compensatory damages to Oakleys for trespass and conversion, as well as punitive damages. Defendants filed a motion to amend the court's decision, which was denied, and this appeal followed.

Defendants first challenge the court's determination of the boundary line. We review the court's finding for clear error only. Pion v. Bean, 2003 VT 79, ¶ 15, 176 Vt. 1 (trial court's "determination of a boundary line is a question of fact to be determined on the evidence," and Supreme Court will uphold such judgment unless clearly erroneous "despite inconsistencies or substantial evidence to the contrary"). Reviewing the evidence most favorably to the Oakleys and making all reasonable inferences in support of the trial court's judgment, we find no error in the court's establishment of the disputed boundary line.

Essentially, defendants contest the court's assessment of the evidence. They cite the evidence they presented at trial, and argue that the trial court should have found it persuasive. As we have often repeated, the assessment of the weight of evidence and the credibility of witnesses are matters exclusively reserved for the trial court. Id. ¶ 17 (reiterating that, as "the trier of fact, it is the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence." (quotation omitted)). We will not reweigh the evidence on appeal. The court found the original monument no longer in place, and this finding is supported by credible evidence in the record. It follows that the specific distance stated in the 1985 deed governed the location of the northwest corner. Neill v. Ward, 103 Vt. 117, 162, 153 A. 219, 239 (1930) ("[I]f the existence or location of monuments is not proved, courses and distances will govern the location of lots on the ground."). Defendants fail to show clear error.

Defendants suggest that the court erred by failing to consider their affirmative defense of adverse possession. They assert that they listed this defense in their answer to Oakleys' complaint, and that their evidence supports this theory. The court addressed this issue in its denial of defendants' motion to alter or amend, and found no outstanding claims. It explained that although defendants offered adverse possession as an affirmative defense in their original answer, they filed no counterclaim for adverse possession, they did not include it in their amended requests for findings and rulings filed April 2009, and they did not present evidence in support of such a claim. Defendants fail to show the court erred in so concluding. They refer generally to evidence they submitted at trial, but identify no specific argument made to the trial court that the evidence demonstrated that the elements of adverse possession were satisfied. See, e.g., Moran v. Byrne, 149 Vt. 353, 355 (1988) ("In this state, adverse possession is accomplished through open, notorious, hostile and continuous possession of another's property for a period of fifteen years." (quotation omitted)), and 12 V.S.A. § 501 (setting statutory period of fifteen years to establish adverse possession claims).

We thus turn to the court's damage awards, beginning with its award of damages for conversion. The court found that in March 2004, Lund helped the Oakleys clear approximately

forty trees from Oakleys' land. Lund had a small sawmill on his property, the use of which he offered to Oakley to mill some twenty of these logs. The logs were transported to Lund's property for this purpose. Several months later, Mr. Oakley spoke with a VIJ member about getting together to saw the logs, but this did not occur. As previously noted, the dispute between the parties arose in the summer of 2004. The court found that the Oakleys never asked for their logs back and that Lund never made them available. At one point, Lund offered to sell the logs back to the Oakleys for $2000. Lund eventually authorized VIJ members to cut up the logs for firewood or burn them in a bonfire. Based on its findings, the court concluded that the Oakleys proved that Lund kept logs he knew belonged to the Oakleys and disposed of them as if they were his own, and that the value of the logs was $2000. The court therefore awarded damages in that amount.

Defendants argue that the elements of conversion were not satisfied here. We disagree. We have stated that conversion "consists either in the appropriation of the property to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the owner's right, or in withholding possession from the owner under a claim of title inconsistent with his title." Economou v. Carpenter, 124 Vt. 451, 454 (1965) (citation omitted). "[W]ith the exception of conversion by demand and refusal, liability for conversion requires that the defendant commit an overt act in reference to the subject property." Id. Taking the evidence in the light most favorable to the verdict, we find the evidence sufficient here. Bevins v. King, 147 Vt. 203, 206 (1986) ("On review, we will make all reasonable inferences in support of the court's judgment."). Lund maintains that the logs were left to rot and that the Oakelys abandoned them, but the court did not so find. The evidence that, at the least, Lund exercised dominion over, or authorized the destruction of, the logs by allowing others to take and burn the logs without the Oakleys' permission and despite the Oakelys' right to recover them, supports the court's conclusion that Lund converted the Oakleys' property.

We turn next to the damages awarded for trespass. Defendants challenge the court's finding that it would cost $8000 to repair the trench, and that the Oakleys' property had been devalued by $5000. In reaching its conclusion as to damages, the court found as follows. Oakley estimated that the cost to repair the trench would be $8000, based on the cost of renting equipment. He testified that a bulldozer costs between $80 to $150 per hour to rent, and the court found this consistent with defendants' testimony that bulldozers could be rented for $150 an hour, and excavators for $175 per hour. The court noted that Oakley previously had rented bulldozers and excavators to do earthmoving work in connection with an annual four-wheel drive truck rally event. The court found both the hourly rate and the number of hours estimated reasonable.

Defendants urge us to reweigh the evidence and find the cost of repairing the trench unreasonable. We decline to do so. The court's finding is supported by credible evidence in the record, and it will therefore stand on appeal. See Powers v. Judd, 150 Vt. 290, 293 (1988) (damages award must be "based upon the evidence furnished at the trial," and "[w]here not all of the damages may be readily ascertainable, the amount of such unliquidated damages is for the determination of the trier of fact," and the Supreme Court "will not interfere with that decision unless it clearly appears that the award is excessive or insufficient" (citation omitted)). Defendants argue that there was no evidence as to the precise number of hours it would take to repair the trench. The trial court reasonably concluded that it would be a time-consuming

project. Oakley testified that the area in question was thickly wooded, and that it would take a significant amount of time and effort to repair the damage done by defendants. If one machine were used at an hourly rate of $150, the damage award reflects approximately fifty-three hours of work. If two machines were used to repair the damage, the damages award reflects approximately twenty-six hours of work. These figures are consistent with the testimony offered at trial, and we find no error in the court's award. See Waterbury Feed Co. v. O'Neil, 2006 VT 126, ¶ 27, 181 Vt. 535 (explaining that "[o]ur cases have not required claimants to present precise figures of damages," and "where damage calculations are based on approximations or estimates not supported by documentation, such shortcomings do not negate them as evidence, but may impact their weight as evidence").

We turn next to the damages caused by the changes in the water flow. The court found that the Oakleys proved by a preponderance of the evidence that VIJ's conduct in cutting the trench to direct water flow down a new channel along the VIJ boundary and placing a four inch pipe that directed water toward the Oakley property resulted in an artificial disruption of the natural water flow that caused the natural water channel to run across the Oakley property in two locations: (1) from the trench down the boundary; and (2) from the boundary along a new course to the interior of the property where it joined a preexisting natural stream. Additionally, the water flow caused damage to the Oakley property by eroding soil out from under the root systems of trees, causing them to fall. The court found the Oakleys entitled to claim damages for such conduct and awarded $5000 for loss of property value.

Defendants argue that the court's award is based on speculation, and that there were no specifics to back up the court's finding and no way for them to know how the court arrived at this value. Again, defendants fail to show that the damages were excessive. Oakley opined that the reduction in value of their property caused by the trench and channel effects was between $25,000 to $40,000, but he did not have any specific facts to support this opinion. The court found that the effects of the VIJ diversion of water onto the Oakley property reduced the value of the property, but that Oakley had probably overstated the effect. The court found that the reduction in value was $5000, which was a portion of the low end of Oakley's estimate. This finding is supported by the evidence. See Waterbury Feed Co. v. O'Neil, 2006 VT 126, ¶ 27. While defendants argue that Randy Oakley is not the owner of the subject property and thus was not qualified to testify to the cost of the damages, they do not show that they objected to Oakley's testimony on this ground below. See In re S.B.L., 150 Vt. 294, 297 (1988) (appellant bears burden of demonstrating how the trial court erred warranting reversal, and the Supreme Court will not comb the record searching for error). VIJ cannot raise this objection for the first time on appeal. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."). The court did not err in looking to Oakley's testimony in determining the diminished value of the land.

Finally, we turn to the court's award of punitive damages. The court recognized that before punitive damages can be awarded, the Oakleys needed to show that defendants acted with actual malice. It stated that actual malice required a showing of conduct manifesting personal ill will, or carried out under circumstances evidencing insult or oppression, or conduct showing a reckless or wanton disregard of one's rights. The court found this requirement satisfied here. It reasoned that Lund, acting at the direction of VIJ, recklessly or wantonly disregarded the Oakleys' property rights when Lund directed the digging of a trench that was clearly located, in

part, on the Oakleys' property. The court noted that the parties were friendly at the time the trench was dug, and that VIJ had ample opportunity to seek the Oakleys' consent. Citing Powers, 150 Vt. 290, the court found punitive damages authorized by law for such conduct, and it awarded punitive damages of $20,000. In response to defendants' motion to alter and amend, the court emphasized that Powers stood for the principle that punitive damages were warranted where a defendant intentionally disregarded a property owner's legal right to exclusive possession, and invaded the property, causing compensable damages. It found the use of punitive damages perfectly consistent with its purpose as a matter of policy: to deter the defendant and others from such conduct.

VIJ argues that the court failed to articulate sufficient reasons for the punitive damages award and that it abused its discretion in making the award. VIJ maintains that the mere fact that Lund directed the digging of a trench on the Oakleys' property does not demonstrate ill will, bad faith, or malice. VIJ cites other punitive damages cases, arguing that they involve conduct much more egregious than that present here. VIJ also emphasizes the court's finding that the parties were on friendly terms at the time that VIJ dug the trench.

We recently clarified the standard by which punitive damages are measured, see Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc., 2010 VT 33, and this standard controls over any language to the contrary in Powers. Thus, to be entitled to punitive damages, a party must establish both "malice, defined variously as bad motive, ill will, personal spite or hatred, reckless disregard, and the like," as well as "wrongful conduct that is outrageously reprehensible." Id. ¶ 18. When a punitive damages award is based on "reckless or wanton misconduct," there must be evidence that "the defendant acted, or failed to act, in conscious and deliberate disregard of a known, substantial and intolerable risk of harm to the plaintiff, with the knowledge that the acts or omissions were substantially certain to result in the threatened harm." Id. ¶ 25. "In keeping with our consistent preconditioning of punitive damage upon outrageously egregious misconduct, the reckless malfeasance or nonfeasance and its attendant risk of harm must all be more reprehensible than simply wrongful or illegal behavior." Id.

In Fly Fish, we vacated a punitive damages award under circumstances similar to those presented here. In that case, the parties owned adjoining parcels of land, one of which was situated downhill from the other. The defendants engaged in a development project on their property that caused silt to enter and damage a pond on the plaintiffs' property. The defendants had taken incomplete measures to prevent erosion and water runoff onto the plaintiffs' property, and this, combined with significant rainstorms, damaged the pond. The plaintiffs recovered punitive damages at trial, but we vacated this award on appeal. "Despite defendants' generally reckless violation of the permit conditions imposed for the protection of plaintiffs' pond," we explained, the record did not "support a punitive award given the absence of outrageously reprehensible conduct and the lack of actual or legal malice towards plaintiffs." 2010 VT 33, ¶ 17.

The facts here are more egregious than those present in Fly Fish in that Lund directed a trench to be dug on land that clearly belonged to the Oakleys. Yet while VIJ's acts were deplorable and interfered with the Oakleys' property rights, its conduct, like that in Fly Fish, does not rise to the level of "wrongful conduct that is outrageously reprehensible." Id. ¶ 18. As we explained in Fly Fish, an "indifference to plaintiffs' rights . . . is not determinative of malice,"

and a "willful violation of the law" alone similarly does not suffice. Id. ¶ 28. See State Agency of Nat. Res. v. Riendeau, 157 Vt. 615, 624-25 (1991) (knowing and willful discharge of mud and silt into a brook by loggers in violation of water quality laws did not support punitive damages absent a malicious motive, in addition to the wrongful acts). Similarly, "a defendant's knowing and even gross indifference to a plaintiff's rights [is] . . . insufficient to satisfy the malice threshold for exemplary damages." Fly Fish, 2010 VT 33, ¶ 28. One must show more. In Shahi v. Madden, 2008 VT 25, ¶ 25, 183 Vt. 320, for example, we upheld a punitive damages award where there was evidence that the plaintiffs' neighbor engaged in a "campaign of terror" against them, accompanied by deliberate trespass and intentional destruction of property. The instant case is analogous to Fly Fish, not Shahi or similar cases involving egregious conduct where we have upheld punitive damage awards. See, e.g., DeYoung v. Ruggiero, 2009 VT 9, 185 Vt. 267 (inferring malice as a matter of law when fiduciary lawyer stole widowed client's funds and lied about it to avoid discovery); Pion v. Bean, 2003 VT 79, ¶ 42, 176 Vt. 1 ("overwhelming" evidence of actual malice to justify punitive damage award where neighbors deliberately destroyed property, removed property marker pins, and intentionally trespassed on plaintiffs' property, all coincident with serial verbal harassment); Wharton v. Tri-State Drilling & Boring, 2003 VT 19, ¶ 19, 175 Vt. 494 (mem.) (punitive damages appropriate where drilling company deliberately filed, then persisted with, false mechanic's lien on property in effort to extort right-of-way concessions from owners who had no prior business with company and owed nothing). As in Fly Fish, we conclude that notwithstanding VIJ's bad acts, "the threatened and resulting harm were not—compared to our precedent—so outrageously reprehensible as to render [defendant's] recklessness malicious as a matter of law." 2010 VT 33, ¶ 27. We therefore vacate the court's punitive damages award.

Affirmed as to the boundary dispute and compensatory damages. Vacated as to the punitive damages award.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice