

STATE OF MICHIGAN
COURT OF APPEALS

RONALD RADULSKI and PATRICIA
RADULSKI,

UNPUBLISHED
July 22, 2004

Plaintiffs-Appellants/Cross-
Appellees,

v

No. 245790
Macomb Circuit Court
LC No. 00-003189-CE

JOSEPH SALOME,

Defendant/Counterplaintiff-
Appellee,

and

BENINATI CONTRACTING, INC.,

Defendant/Counterdefendant-
Appellee/Cross-Appellant,

and

STANLEY R. REKEN, KURSTAN, INC.,
CAPITAL VENTURES OF NEVADA, GIANNO
AUGUSTUS FERRARI, and PAUL BENINATI,

Defendants.

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Plaintiffs appeal as of right, and defendant Beninati Contracting, Inc. (hereinafter “Beninati Contracting”) cross appeals, from a judgment, following a jury trial, awarding plaintiffs \$35,000 in compensatory damages on their trespass claim against defendants Joseph Salome and Beninati Contracting. The jury rejected plaintiffs’ claim for treble damages under the timber trespass statute, MCL 600.2919. We affirm.

Plaintiffs alleged that defendants Salome and Beninati Contracting were liable for treble damages pursuant to MCL 600.2919 for intentionally trespassing on their property and

destroying trees and vegetation on the property. Defendants did not dispute that they committed a trespass that led to the destruction of trees and vegetation on plaintiffs' property, but contested plaintiffs' entitlement to treble damages under MCL 600.2919. The jury awarded plaintiffs compensatory damages of \$35,000, but rejected plaintiffs' claim for treble damages.

We begin by addressing Beninati Contracting's claims on cross appeal that the trial court erred in denying both its motion for partial summary disposition under MCR 2.116(C)(10), and its motion for a directed verdict at trial, with regard to plaintiffs' claim for treble damages.

A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Summary disposition is appropriate if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters, supra* at 720.

A trial court's decision on a motion for a directed verdict is also reviewed de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review all the evidence presented up to the time of the motion to determine whether a question of fact existed, and, in doing so, we must view the evidence in the light most favorable to the nonmoving party and resolve any conflicts in the evidence in that party's favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

Beninati Contracting argues that the undisputed evidence showed that any trespass that occurred was the result of its good faith, albeit mistaken, belief that it was only clearing trees and vegetation on defendant Salome's property, thus, precluding treble damages under MCL 600.2919. Insofar that Beninati Contracting raised this argument in its motion for summary disposition, we conclude that the motion was properly denied because Beninati Contracting did not submit any documentary evidence in support of its motion and, therefore, failed to carry its initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence showing that there was no genuine issue for trial. *Smith, supra* at 455.

We conclude, however, that the trial court erred when it denied Beninati Contracting's motion for a directed verdict on the treble damages claim at trial.

The provision in MCL 600.2919 that allows for treble damages is not designed to impose liability absent active misconduct. *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982), or a knowing and intentional trespass. *Governale v Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975). Thus, a defendant's good faith and honest belief that he possessed the legal authority to commit the complained-of act will preclude liability for treble damages. *Id.* Further, "[t]reble damages under MCL 600.2919 . . . may not . . . be awarded where the trespass was merely negligent." *Iacobelli Construction Co, Inc v The Western Casualty & Surety Co*, 130

Mich App 255, 262; 343 NW2d 517 (1983). Under the statute, a plaintiff need not show that a defendant acted with malice or an intent to do injury, but the trespass must be more than negligent for treble damages to be awarded. *Id.* at 261, 263. While the plaintiff has the burden of proving that the cutting was done without his permission, the defendant has the burden of proving that the trespass was casual and involuntary, rather than wilful, to avoid treble damages. *Stevens, supra*.

Viewing the trial evidence in the light most favorable to plaintiffs, we conclude that no reasonable juror could have found that Beninati Contracting intentionally trespassed on plaintiffs' property so as to give rise to treble damages under MCL 600.2919. The evidence demonstrated that Beninati Contracting had a good faith and honest belief that it had the legal authority to enter the property to clear it of trees and vegetation. Specifically, defendant Salome provided Paul Beninati, the owner of Beninati Contracting, and Otis Gibson, an employee of Beninati Contracting, with site plans of the property and instructed Gibson about the property line. Beninati testified that it was his understanding that Gibson was on Salome's property. Elbert Tharp, a Chesterfield Township supervisor who reported to the property after the clearing, similarly testified that Gibson sincerely believed that he was on Salome's property. Plaintiffs failed to introduce evidence that would allow a rational trier of fact to infer that Beninati Contracting's trespass arose to a level of active misconduct. Although the trial court expressed that Beninati Contracting should have obtained a survey before commencing work on clearing defendant Salome's property, any failure in this regard would only constitute evidence of mere negligence, not active misconduct. Therefore, the trial court's decision denying Beninati Contracting's motion for a directed verdict on the question of treble damages under MCL 600.2919 was erroneous.

In light of our decision with regard to Beninati Contracting's cross appeal, plaintiffs' claim of instructional error is technically moot with respect to Beninati Contracting. But because defendant Salome has not similarly filed a cross appeal claiming entitlement to a directed verdict, review of plaintiffs' instructional issue is still necessary in relation to defendant Salome. Regardless, it is apparent that plaintiffs have not established any instructional error warranting appellate relief against either defendant.

In *Michigan Land & Iron Co v Deer Lake Co*, 60 Mich 143, 145-146; 27 NW 10 (1886), our Supreme Court found no error where the trial court instructed the jury that, in determining whether the plaintiff was entitled to recover treble damages under the statute, "there must be some evidence of willfulness, wantonness, or evil design" on the part of the defendant. See also *Schankin v Buskirk*, 354 Mich 490; 93 NW2d 293 (1958) (affirming a judgment awarding treble damages where the jury found that the defendant's employees were "guilty of 'wilfulness, wantonness, or evil design' in cutting the trees"), and *Miller v Wykoff*, 346 Mich 24; 77 NW2d 264 (1956) (finding no error in trebling damages where the jury found that the defendant wilfully and wantonly trespassed upon their land). The trial court's jury instruction on treble damages accurately stated the applicable law as reflected in these decisions.

Lastly, we find no merit to plaintiffs' claim regarding the status of Otis Gibson. First, plaintiffs do not cite any legal authority in support of their position. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *In re Pensions of 19th District Judges Under Dearborn Employees Retirement System*, 213 Mich App 701, 707; 540 NW2d 784 (1995). Where a party merely announces a position and provides

no authority to support it, we consider the issue waived. See *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). Second, the record discloses that when this issue arose at trial, plaintiffs' counsel agreed that Gibson was never properly served and would have to be subpoenaed if plaintiffs wanted to call him as a witness. Error requiring reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 683-684; 591 NW2d 438 (1998). A party cannot stipulate to a matter, or waive objection and then argue on appeal that the resultant action was error. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). Therefore, appellate relief is not warranted.

The judgment awarding plaintiffs compensatory damages of \$35,000 is therefore affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper