STATE OF MICHIGAN

COURT OF APPEALS

WENDY NIENHAUS and JOHN NIENHAUS, Plaintiffs/Counter-Defendants-Appellees,	UNPUBLISHED December 26, 2013
v	No. 306723 Oakland Circuit Court
KEITH COTCHER, Defendant/Counter-Plaintiff-Appellant.	LC No. 2010-109255-CZ

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right the judgment in this action for trespassing, nuisance, conversion, and stalking. We affirm.

I. BASIC FACTS

This case is a property dispute between defendant and plaintiffs, who live on lakefront property in White Lake Township. Plaintiffs filed a complaint, in which they alleged trespass, nuisance, and conversion, resulting from defendant's installation of a dock and boathouse 24 feet over the shared property line into their lot. Defendant filed counterclaims of trespass and nuisance against plaintiffs, alleging that they placed "a fence, trees and landscaping material" on his property, "invad[ing] . . . exclusive possession of his land" and blocking his view of the lake. The counterclaim did not explicitly claim, as defendant would in later proceedings, that defendant acquired the "property" onto which plaintiffs allegedly trespassed by adverse possession.

Plaintiffs moved for partial summary disposition under MCR 2.116(C)(10) with respect to their claims of trespass, nuisance, and conversion, arguing that there was no genuine issue of material fact on those issues. They also sought and obtained leave to file an amended complaint to add claims of interference with use and enjoyment of property, harassment, and stalking. Defendant filed an answer stating that he "does not interfere with [plaintiffs'] use of their property" and that "[p]laintiffs state no fact supporting their allegations" that defendant harasses

and stalks them. In an opinion and order, the trial court addressed the first three counts of plaintiffs' first amended complaint (trespass, nuisance, and injunctive relief),[1] granted plaintiffs' motion for partial summary disposition with respect to the trespass claim and request for injunctive relief, and denied the motion with respect to the nuisance claim. The court ordered defendant to remove the trespassing structures within 30 days of the entry of the opinion and order.

A. TRESPASS, NUISANCE, AND CONVERSION

At trial, before voir dire began, defendant requested a jury instruction on adverse possession, arguing that the "walkway . . . halfway into his property has been used for fifty years." Plaintiffs objected, arguing that defendant waived his entitlement to that instruction because "there's been no claim for adverse possession," as defendant's counterclaims included only trespass and nuisance. Defendant replied that plaintiffs' counsel was "aware" of his adverse-possession claim because "[i]t's been discussed . . . in the mediations and valuation" and was implicitly included in his trespass claim. The trial court denied the request, finding "undue delay" in making the request and that plaintiffs would suffer "undue prejudice" if the instruction were read.

Plaintiff John Nienhaus ("Nienhaus") testified that he moved into the house immediately south of defendant's in 2005. Thomas Peter Michael Long, Jr., a mutual neighbor, said that the relationship between defendant and Nienhaus was, at first, "pleasant." When defendant built the boathouse, in about 2007, Nienhaus hired David Smith, a licensed surveyor, on defendant's recommendation, to perform a survey. When it revealed that defendant's boathouse encroached on plaintiffs' property, a fact Long said was "apparent" based on the position of the boathouse in relation to a survey stake placed by Smith, Nienhaus initially did not confront defendant because he "didn't feel comfortable" doing so due to defendant's confrontational reputation. Long said that defendant "was surprised at the size of the boathouse" when it was first built, and defendant expressed to Long his concern "that it would be impinging [sic] [on plaintiffs'] property." Defendant denied having had that conversation.

Nienhaus said he asked Smith to mark the property line with stakes before he planted arborvitaes trees near the property line. Plaintiffs asked Smith to be present while a contractor installed a fence, for which plaintiffs obtained a permit, between their parcel and defendant's because they were "very nervous and adamant" that "[t]he fence was not going to be on [defendant's] property."

B. HARASSMENT AND STALKING

Nienhaus said that, after plaintiffs' survey revealed that defendant's dock and boathouse were partially situated on plaintiffs' property, and plaintiffs installed a fence and planted arborvitaes near the property line, defendant became increasingly volatile. On at least 10

[1] The opinion and order did not address the counts plaintiffs added in their amended complaint (conversion, attorney fees, interference with use and enjoyment of property, and harassment and stalking).

occasions, Nienhaus witnessed defendant "stop . . . his rear tires right on the rock edge[,] or within a foot or two[,] and intentionally peel out . . . numerous times," leaving tire marks and rocks on plaintiffs' driveway, "[u]sually late in the evening when no one was around to see it." Defendant admitted doing this "[a] handful" of times, and would perform the same maneuver on plaintiffs' lawn, leaving tire marks and requiring plaintiffs to replace the grass, which a neighbor witnessed on at least two occasions. Defendant admitted "go[ing] over [Nienhaus's] lawn" with his motor home because "that was where [defendant's] ingress and egress had been for 20 years." Defendant said he "spun [his] tires" on plaintiffs' lawn out of "foolishness," "frustration," and "stupidity."

In the fall of 2009, while workers were adding a cement area in front of plaintiffs' garage, defendant drove his SUV through the wet cement. Brian Allen, the contractor who oversaw the project, saw this, and opined that defendant did not drive through the wet cement accidentally because he had, minutes before, "lay[] on his horn[,] telling [the workers] to get the F [sic] out of his way . . . ." Defendant admitted having done this, saying that he "waited for an hour and a half for those [workers] to move [their] stuff. And they wouldn't." On cross-examination, he said it was accidental. On another occasion, defendant parked vehicles and placed equipment on plaintiffs' property, without permission, while removing a tree from defendant's property. Plaintiffs also introduced evidence that defendant captured chipmunks, drowned them, and placed the carcasses on plaintiffs' property, which defendant denied. Nienhaus said defendant used a leaf blower to blow leaves from his property onto plaintiffs', and stored his dock on plaintiffs' property during the winter without permission. Defendant at first denied deliberately blowing leaves onto plaintiffs' property, but when he was shown surveillance footage of himself doing just that, he said, "They're [Nienhaus's] leaves, and I don't want them on my property."

Immediately before closing arguments, defense counsel moved for permission to argue to the jury that plaintiffs purchased their property subject to a prescriptive easement in favor of defendant because they had actual knowledge that defendant used a portion of their property to access his own. Plaintiffs said they had no such knowledge and objected, and the trial court denied the motion because to grant it would have been "a trial by ambush."

The jury found that defendant committed trespass, nuisance, and conversion, and stalking and/or harassment, and awarded plaintiffs $3,000 on the trespass claim, $10,000 on the nuisance claim, $3,000 on the conversion claim, and $14,000 on the stalking and/or harassment claim. With respect to defendant's counterclaims, the jury found that plaintiffs did not commit trespass or nuisance. Plaintiffs filed a motion for entry of an order of judgment, seeking the amount of the jury verdict, attorney fees under MCL 600.2919a(1) (conversion) and MCL 600.2954(1) (stalking), actual and taxable costs, and case evaluation sanctions under MCR 2.403. An order of judgment for $62,324.11 was filed, granting all of plaintiffs' requests.

C. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant filed a motion for a new trial or judgment notwithstanding the verdict, on the grounds that plaintiff's attorney "made false statements . . . by saying that he was not aware of [d]efendant's theory of the case regarding adverse possession and prescriptive easement" and that Smith "admitted that previous surveys that were conducted were real [sic] close to accurate[,] which would make [Smith's] survey inaccurate." The trial court denied the motion

for a new trial, but allowed that it would "conduct an evidentiary hearing regarding whether false statement[s] were made [by plaintiffs' attorney] and whether such statements . . . were dispositive to the Court's ruling on jury instructions."

At the evidentiary hearing, defendant's trial counsel testified that he discussed adverse possession and prescriptive easement at a presettlement conference, at plaintiffs' attorney's office, at mediation, and at case evaluation. Defendant testified that "it was all based upon adverse possession and prescriptive easement. . . . That was our whole defense." The trial court found defendant and his attorney not credible and that "the assertion that the theories of adverse possession and prescriptive easement were disclosed to the [plaintiffs] or [their] counsel prior to trial [was] a pure fiction." Defendant timely filed a claim of appeal with this Court.

II. LAW AND ANALYSIS

Defendant first argues that the trial court erred when it granted partial summary disposition on plaintiffs' trespassing claim. We disagree.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10). "This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). "We review de novo issues of statutory interpretation." *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Const, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 441; 814 NW2d 670 (2012). "This Court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Auto Club Group Ins Ass'n v Andrzejewski*, 292 Mich App 565, 569; 808 NW2d 537 (2011). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must . . . set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

"Trespass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it." *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008). "In Michigan, recovery for trespass to land 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. Moreover, the intrusion must be intentional." *Id.* (internal citations and quotations omitted). "A 'direct or immediate' invasion for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the

plaintiff's land. Damages may be recovered for any *appreciable* intrusion." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 723; 808 NW2d 277 (2010) (emphasis in original).

In support of their motion for partial summary disposition, plaintiffs provided

(1) a recorded warranty deed that establishes their ownership of six contiguous lots located immediately south of defendant's two lot contiguous lots;

(2) a survey completed by Smith;

(3) Smith's affidavit concluding, *inter alia*, that "the boat house which originates on [defendant's] Lot 11 actually extends some 24 feet into [plaintiffs'] Lot 12 on a diagonal[,] with only the north corner of the boat house being in Lot 11";

(4) a photograph of the boathouse;

(5) Long's affidavit stating that defendant "advised [Long] that he was well aware the boat house was over the boundary line . . . but that he believed the [plaintiffs] were unaware of the infringement, . . . and that he was under the belief and hope that they would remain oblivious to the infringement overall"; and

(6) Wendy Nienhaus's affidavit stating that defendant did not have permission to construct the dock and boathouse on their property, that he refused to remove them when asked, and that the boathouse "interfere[d] with [plaintiffs'] ownership and use of lot 12" because "over half of the width of that lot is being taken up by [defendant's] boat house."

This evidence established a prima facie cause of action for trespass. The recorded warranty deed was rebuttable proof of plaintiffs' ownership of six contiguous lots immediately south of defendant's parcel of two lots,[2] and a survey established that defendant's boathouse, which originated on his lot 11, encroached southward on plaintiffs' lot 12 to such an extent that only an insubstantial sliver of the surface area of the boathouse remained on defendant's own lot.

In rebuttal, defendant offered only his own affidavit, stating that the facts in his brief were "accurate to the best of [his] knowledge." He insisted that factual questions necessitating trial existed concerning Smith's methodology for performing the survey, including the type of equipment Smith used, whether he found irons buried underground, and why Smith's survey contradicted one defendant commissioned in 1993. He did not attach the 1993 survey, however, nor did he explain how the two surveys differed, and only evidence that would be admissible at trial can be considered in a summary disposition motion. See MCR 2.116(G)(6); *Dextrom v Wexford Co*, 287 Mich App 406, 427; 789 NW2d 211 (2010). Concerning Smith's

[2] See MCL 600.6055(3) ("The original certificate [of sale of real property], or the record thereof, or a transcript of the record, duly certified by the register of deeds shall be prima facie evidence of the facts therein set forth, of the regularity of the sale, and of all proceedings in the cause anterior thereto.").

methodology, his affidavit stated that the survey "was done in accordance with and in consideration of the standards and requirements for real property land surveying as established for the survey industry and the contents of the [s]urvey were true at the time they were prepared."

The intent requirement of plaintiffs' trespass claim was satisfied in two ways. First, Long's affidavit testimony established that defendant had actual knowledge—"was well aware"—that the boathouse crossed the property line between defendant's and plaintiffs' adjoining lots, and "was under the belief and hope that [plaintiffs] would remain oblivious to the infringement overall." Second, even if the conversation between defendant and Long, which defendant denied, had never occurred, the magnitude of the infringement was such that defendant "reasonably should have known" that his placement of the boathouse "would result in the physical invasion of [plaintiffs'] land." *Boylan*, 289 Mich App at 723.

Defendant has not "set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); *Coblentz*, 475 Mich at 569. Aside from raising questions about Smith's methodology, the nearest defendant came to disputing any fact established by plaintiffs' evidence was his statement that Smith "indicated the boat house was 25 feet on [plaintiffs'] property[,] which seems absurd considering the frontage on [defendant's] lot 11 is only 39 feet." But his attempt to contradict Smith's findings with his own interpretation of a survey he did not produce[3] was insufficient to rebut the results of Smith's survey. Viewing the evidence in the light most favorable to defendant, there was no genuine issue of material fact with respect to plaintiffs' trespass claim. Because the evidence established that plaintiffs were entitled to judgment as a matter of law on that claim, summary disposition under MCR 2.116(C)(10) was appropriate.

Defendant next argues that the trial court committed error requiring reversal when it excluded a special jury instruction regarding adverse possession and prescriptive easement requested by defendant.[4] We disagree.

"This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint." *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012).

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[3] Because defendant was testifying about the contents of a document for the purpose of proving their truth, this constituted hearsay within hearsay, see generally *Merrow v Bofferding*, 458 Mich 617, 625-628; 581 NW2d 696 (1998), and could not have been considered by the trial court in ruling on plaintiffs' motion, *Dextrom*, 287 Mich App at 427.

[4] Defendant analyzes this issue as a request for a jury instruction. Because he claims that adverse possession and/or prescriptive easement formed the basis of his counterclaim for trespass, we consider the request, as the trial court did, as a motion to amend the pleadings, as defendant did not comply with the requirements, under MCR 2.512(A)(1) and (A)(3), that proposed jury instructions be filed in writing and served on opposing parties.

"Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." MCR 2.118(A)(2); *Decker v Rochowiak*, 287 Mich App 666, 681-682; 791 NW2d 507 (2010). Interpreting MCR 2.118(A)(2), this Court held:

> Trial courts have discretion to grant or deny motions for leave to amend, but leave should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed or futility. In regard to undue delay, delay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. Prejudice exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. [*Decker*, 287 Mich App at 681-682 (internal citations and quotations omitted).]

This fact-specific property dispute demanded adequate preparation before trial began. The wisdom of the trial court's denial of defendant's motion to amend his pleadings to add a claim of adverse possession and/or prescriptive easement is evident when considering the burden of successfully proving a claim of adverse possession:[5]

> To establish adverse possession, the person claiming it (e.g., the person opposing the real property action by the existing owner, by asserting the limitations-period defense) must show that his or her possession was actual, visible, open, notorious, exclusive, hostile, under cover of a claim of right, continuous, and uninterrupted for the statutory period of 15 years. [*Beach v Lima Twp*, 283 Mich App 504, 512; 770 NW2d 386 (2009), aff'd 489 Mich 99 (2011).]

Relatedly, a prescriptive easement "results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007).

To support his claims for adverse possession and/or prescriptive easement, defendant could have relied on photographs, testimony from neighbors, the survey to which he referred in his response to plaintiffs' motion for partial summary disposition, and testimony of the surveyor

[5] Perhaps owing to the volume of evidence an adverse-possession claimant must show, the rule in a few jurisdictions is that adverse possession is waived if it is not specifically pleaded. See, e.g., *Sutton v Gardner*, 387 SW3d 185, 190 (Ark App, 2011); *Brown v Akin*, 790 So 2d 893, 895 (Miss App, 2001); *McNamara v Lake in the Sky, Inc*, 641 NYS2d 921, 922 (NY App, 1996); *Smith v Brooks*, 825 SW2d 208, 210 (Tex App, 1992); *Deem v Cheeseman*, 446 NE2d 904, 908 (Ill App, 1983). But see *Durrah v Wright*, 63 P3d 184, 191 (Wash App, 2003) (complaint to quiet title by adverse possession "may simply allege that [the plaintiff] has title or is the owner of the land; it need not specifically allege adverse possession").

who performed it. However, at no point during the pendency of these proceedings did defendant produce any of this evidence, excluding his unsupported allusion to the 1993 survey. Plaintiffs would have encountered the entirety of this evidence for the first time in the middle of a jury trial, depriving plaintiffs' counsel of the ability to prepare to cross-examine witnesses, subpoena additional witnesses of his own, and undertake other research, and frustrating the purpose of discovery, which is "to simplify and clarify the contested issues." *Hamed v Wayne Co*, 271 Mich App 106, 109; 719 NW2d 612 (2006). See also *Cutliff v Densmore*, 354 Mich 586, 592-593; 93 NW2d 307 (1958) (trial court's denial, on the basis of undue surprise or hardship to the defendant, of the plaintiff's motion to amend the complaint to include an adverse-possession claim, was not an abuse of discretion, where the motion was made four years after the complaint was filed). The short notice raised a substantial risk that plaintiffs would have been prejudiced by allowing the reading of the special jury instruction on adverse possession and/or prescriptive easement. Therefore, the trial court's denial of defendant's motion to amend did not "result[] in an outcome falling outside the range of principled outcomes," *Jilek*, 297 Mich App at 665, and was not an abuse of discretion.

Defendant next argues that the jury verdict was against the great weight of the evidence. We disagree.

"A trial court's decision to grant or deny a motion for a new trial under MCR 2.611 is reviewed for an abuse of discretion." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Jilek*, 297 Mich App at 665. The trial court may grant a new trial when a party's "substantial rights are materially affected" by "[a] verdict or decision against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e); *Taylor v Mobley*, 279 Mich App 309, 313-314; 760 NW2d 234 (2008). "When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict only when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (internal quotations omitted). "This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence." *Id.* "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Id.* "It is the jury's responsibility to determine the credibility and weight of the trial testimony. The jury has the discretion to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted, and we must defer to the jury on issues of witness credibility." *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008).

Smith testified that he used records from a previous survey and "original monumentation," meaning underground iron bars or pins to serve as markers. He could not find some of the original markers that were buried when the subdivision was first platted, but said that "[i]t's not uncommon for the corners to be replaced through the course of fifty, sixty years," or else concealed when a house was constructed on top of them, and he instead used replacement markers that "may not have been the original ones[,] but they were in the correct position according to this plat and they measured correctly." He found "probably six to ten points that all work in harmony to [sic] each other on this plat." Smith said that the monumentation he located was "within tolerances," which means that he "can lose one foot in five thousand feet."

At the hearing on defendant's motion for a new trial, defendant argued, as he does on appeal, that the jury "didn't interpret [Smith's] testimony properly." It bears emphasizing that the jury was not tasked with deciding whether defendant was liable for trespassing; that question had already been resolved when the trial court granted partial summary disposition in favor of plaintiffs on their trespass claim. Although defendant maintains that the boathouse was placed on his property based on a previous survey, he did not seek to admit that survey into evidence, and did not call the surveyor as a witness. While the jury is not obligated to accept uncontroverted evidence, the core of defendant's argument—that the jury came to the wrong conclusion—is at odds with the principle that the credibility and weight of the evidence are to be decided by the jury. *Guerrero*, 280 Mich App at 669. The Court need not be familiar with generally accepted principles of land surveying to hold that, even if defendant's criticism of Smith's techniques were accurate, the jury was entitled to believe Smith when he said that he complied with industry standards. Further, even if any of Smith's testimony was inaccurate, defendant did not introduce any contradictory evidence to establish this, for example, by way of a treatise or an expert witness of his own. Defendant's argument that the jury was incorrect for failing to find plaintiffs liable to him for trespassing and nuisance suffers from the same defect: its premise is that the jury did not understand Smith's testimony. Because there was "competent evidence to support" the verdict with respect to plaintiffs' trespass claim and defendant's trespass and nuisance counterclaims, *Ellsworth*, 236 Mich App at 194, the jury verdict was not against the great weight of the evidence.

> A person is subject to liability for a private nuisance if
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> > (a) the other [person] has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (*i*) intentional and unreasonable, or (*ii*) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 429; 770 NW2d 105 (2009).]

Uncontroverted evidence showed that the boathouse and dock defendant installed encroached by what Smith called a "[s]ubstantial" amount over the property line into plaintiffs' lot. That amount might, itself, have been sufficient for a jury to have found the encroachment "unreasonable," satisfying the fourth element of the test for private nuisance. *Capitol Props Group, LLC*, 283 Mich App at 429. Additionally, Long testified that defendant "was surprised at the size of the boathouse" when it was first built, which Long said was "bigger than the average boathouse," and defendant expressed to Long his concern "that it would be impinging [sic] [on plaintiffs'] property." Defendant denied having had that conversation, but the jury could have chosen to believe Long, and this Court defers to the jury's credibility judgment. *Guerrero*, 280 Mich App at 669. Because the facts do not "clearly preponderate in the opposite direction," *Shade*, 291 Mich App at 21, the jury's findings that defendant was liable to plaintiffs for private nuisance, and that plaintiffs were not liable for private nuisance, were not against the great weight of the evidence.

Defendant argues that the jury verdict was against the great weight of the evidence to the extent that it did not find plaintiffs liable to him for violating a deed restriction and planting trees

that blocked his view of the lake. These claims are absent from both defendant's counter-complaint and the jury verdict form, which contain only defendant's counterclaims for trespass and nuisance. The jury was not instructed on whether the deed restriction created a private right of action in defendant, and if so, what he was required to prove in order to establish his right to recover damages. Defendant's counterclaims failed to preserve his entitlement to such an instruction, nor did the evidence support one. Further, defendant's brief on appeal failed to cite any law supporting his entitlement to damages based on the violation of a deed restriction.

The jury was also not instructed on defendant's right to be compensated for an obstructed view of the lake, and defendant's brief on appeal cites no law on the subject. In general, Michigan does not recognize a right to a view. See *Krulikowski v Tide Water Oil Sales Corp*, 251 Mich 684, 687; 232 NW 223 (1930) ("An easement for light and air may not be acquired by use or by prescription. An adjoining owner may build up to his lot line, unless restricted from doing so, or unless he intends thereby to injure his neighbor or acquire no advantage or benefit to himself."). Because the jury was not asked to decide whether plaintiffs violated a deed restriction, whether plaintiffs obstructed defendant's view of the lake, or whether defendant was entitled to damages arising from those allegations, defendant cannot obtain relief on the basis that the verdict was against the great weight of the evidence.

Defendant next argues that the trial court's award of unreasonable attorney fees was clearly erroneous. We disagree.

"We review a trial court's decision whether to award attorney fees for an abuse of discretion, the trial court's findings of fact for clear error, and any questions of law de novo." *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). MCR 2.403(O) provides:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
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> (3) For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306. After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.
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> (6) For the purpose of this rule, actual costs are

> (a) those costs taxable in any civil action, and
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> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

See also *Haliw v City of Sterling Heights*, 471 Mich 700, 704-711; 691 NW2d 753 (2005). Defendant rejected the case evaluation, pursuant to MCR 2.403(L)(1), by failing to respond in writing within 28 days. Plaintiffs accepted the portion of the case evaluation that would have awarded defendant $2,500 for his counterclaims, and rejected the portion that would have awarded plaintiffs $3,500. Because the verdict was not "more favorable to the rejecting party than the case evaluation," MCR 2.403(O)(1), defendant, as the rejecting party, must pay plaintiffs' "actual costs" as defined by MCR 2.403(O)(6). Defendant does not dispute the amount of the requested costs.

Plaintiffs claimed a total of $24,107 in attorney fees based on an hourly rate of $190. "A person damaged as a result of . . . [a]nother person's . . . converting property to the other person's own use" may recover reasonable attorney fees. MCL 600.2919a(1)(a); *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005). A victim of stalking and/or aggravated stalking, as defined by MCL 750.411h and MCL 750.411i, respectively, may recover reasonable attorney fees in addition to "exemplary damages." MCL 600.2954(1). Because the jury found defendant liable to plaintiffs for both conversion and stalking, plaintiffs are entitled to reasonable attorney fees.

Discussing trial courts' determination of reasonable attorney fees, the Supreme Court of Michigan held:

> [A] trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services . . . . In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . Thereafter, the court should consider the remaining [factors set out in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982)] to determine whether an up or down adjustment is appropriate. And, in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors. [*Smith v Khouri*, 481 Mich 519, 530-531; 751 NW2d 472 (2008).]

The *Wood* factors are:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood*, 413 Mich at 588.]

The trial court found "no indication that the billable hours . . . [were] puffed up or excessive," and addressed each *Wood* factor:

> The moving counsel's professional standing, reputation, experience, and ability all warrant[] the attorney fee that's been issued. The time, labor, and skill that [were] set forth in this case . . . [are] reflected in the costs that have been requested. The amount in question and the results achieved, I've already reviewed.
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> There was some difficulty in this case. The boathouse[,] and how the motion for summary disposition was filed and other issues that were presented, presented significant issues for trial and otherwise. There were expenses incurred. These fees are customary in Oakland County. The nature and length of the professional relationship with the client also suggests this is a reasonable fee.
>
> Of course, the fee is based on billable hours. I find the totality of those warrant the award that has been requested, and I will execute an order reflecting the same.

It is clear from the record that, contrary to defendant's assertion that the court "did not make the effort to determine the reasonableness of the attorney fees," it instead closely followed the process established by the Michigan Supreme Court for ensuring that attorney fee awards are reasonable. Defendant has not shown that he is entitled to relief on this ground.

Affirmed. Plaintiffs, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood